CLERK'S COPY.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

No. 183

FORD MOTOR COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

OCTOBER TERM, 1937

No. 7919

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

FORD MOTOR COMPANY, Respondent

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 7, 1938

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board (hereinafter referred to as the Board), pursuant to the authority conferred upon it by the provisions of an Act of Congress, approved July 5, 1935 (49 Stat. 449, Chap. 372; U. S. C. Title 29, sections 151-166), known as the National Labor Relations Act, respectfuly petitions this Honorable Court for the enforcement of a certain order issued by said Board in a proceeding instituted by it against respondent, the Ford Motor Company. Said proceeding is known upon the records of the Board as Case No. C-199, the title thereof being "in the matter of Ford Motor Company and International Union, Automobile Workers of America."

In support of this petition, the Board respectfully shows:

(1) Respondent is, and at all times hereinafter mentioned was, a corporation duly organized under and existing by virtue of the laws of the State of Delaware and has and maintains its principal executive offices at the city of Dearborn, State of Michigan. Respondent's plants involved in [fol. 2] this proceeding are located at the city of Highland Park and at the city of Dearborn, both in the State of Michigan.

2. By reason of the matters alleged in paragraph 1, this court has jurisdiction of this petition by virtue of Section 10(e) of the said National Labor Relations Act.

(3) Charges having been filed with the Regional Director of the Board for the Seventh Region by the International Union, United Automobile Workers of America, the Board, by its said Regional Director, issued on June 26, 1937, its complaint in said proceeding No. C-199, alleging that respondent had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, which complaint, together with a notice of hearing thereon, was served upon respondent. On July 3, 1937, respondent filed its answer to the complaint.

(4) Thereafter, the Board, by John T. Lindsay as Trial Examiner duly designated by the Board, held a hearing in Detroit, Michigan, on July 6, 1937 to July 30, 1937, at which testimony and other evidence with respect to the allegations of the complaint were adduced. The respondent appeared at the hearing by counsel, participated therein, and offered evidence in its behalf. During the hearing amendments to the complaint were made and answers filed thereto. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to all parties. Respondent's original answer contained a motion to dismiss the complaint on various grounds. This motion to dismiss was made at the commencement of the hearing, and renewed at the conclusion of the Board's case, at the conclusion of Respondent's case, and at the conclusion of the hearing. The motions were denied by the Trial Examiner. Exceptions to these and other rulings of the Trial Examiner at the hearing were taken by the respective parties.

[fol. 3] (5) By order of the Board, dated August 3, 1937, the proceeding was transferred to and continued before the Board in accordance with Article II, Sec. 37 of the National Labor Relations Board Rules and Regulations, Series I, as amended.

(6) Thereafter, on the 22nd day of December, 1937, the Board, having first considered the matter and being sufficiently advised in the premises, and being of the opinion upon all the testimony and evidence that the respondent had been and then was engaged in certain unfair labor practices affecting commerce within the meaning of said National Labor Relations Act, duly stated its findings of fact and

issued and entered the following order directed to respondent, its officers, agents, successors and assigns:

"Order

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board herby orders that the respondent, Ford Motor Company, its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) Discouraging membership in International Union, United Automobile Workers of America or any other labor organization of its employees by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their membership in, activity in behalf of, or sympathy toward any such labor organization;

"(b) Dominating or interfering with the formation or administration of Ford Brotherhood of America, Inc., or any other labor organization of its employees, or contributing financial or other support to any such labor organization;

"(c) Organizing, maintaining, supporting or assisting vigilante or similar groups, or employing or using such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America or any other labor organization of its employees;

"(d) Threatening, assaulting, beating, or in any other manner interfering with, restraining, or intimidating, directly or indirectly, members of International Union, United Automobile Workers of America or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant;

"(e) Circulating, distributing or otherwise disseminating among its employees statements or propaganda disparaging or criticizing labor organizations or advising its employees not to join such organizations;

[fol. 4] "(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to George Onnela, Richard Weyhing, Clarence Fleming, Elmer Mackie, Thaddeus Radke, Alfred Onnela, Ray Onnela, Martin Jensen, Clifford Sheldon, John J. Dovey, Anthony J. Schipper, Fred Nygard, George B. Zubick, Joseph Gutierrez, John Barron, Joseph Sable, Alphonse Kuzulis, Homer King, Percy Llewellyn, Joseph Nierotko, George Smick, Joseph Galusky, Hector F. Manseau, Birtus C. Hall, Emil Tomkow, Joseph Bailey, John Cwikiel, Fred Gullickson, and Jacob Winsiewski immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

"(b) Make whole the persons named in paragraph 2(a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less any amount each has earned during that period;

"(c) Post immediately in conspicuous places throughout all departments of its plants in Dearborn and Highland Park, Michigan, notices to its employees stating that the respondent will cease and desist in the manner aforesaid;

"(d) Maintain such notices for a period of at least sixty (60) consecutive days from the date of posting;

"(e) Notify the Regional Director for the Seventh Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

"And it is further ordered that the allegations of the complaint be, and they hereby are, dismissed with respect

to Raymond Jewell, George Sazynski, Guiseppe Gregorio, Gabriel Bobaila, Leo J. Krugh, and Daniel Devor."

(7) Said order is and at all times since its issuance has been in full force and effect.

(8) Thereafter, on the 23rd day of December, 1937, said order was served upon respondent by personal service of a copy thereof upon respondent's attorney of record in the said proceeding C-199, and by leaving a copy thereof at the principal office of the respondent at Dearborn, Michigan.

(9) Thereafter, on January 3, 1938, respondent filed with the Board its petition to vacate and set aside the Board's decision and order and for rehearing, which petition the [fol. 5] Board denied on January 4, 1938.

(10) Respondent has failed to comply with said order of the Board and has announced that it has no intention to comply therewith, and the Board is advised and believes and accordingly alleges that the respondent will not comply therewith unless and until required so to do by this Honorable Court.

Wherefore, the Board petitions this Honorable Court for the enforcement of its order of December 22, 1937; and pursuant to Section 10(e) of said National Labor Relations Act, is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact and the order of the Board.

The Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in such transcript and upon the order made thereon a decree enforcing in whole said order of the Board and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

(S.) J. Warren Madden, Chairman; (S.) Edwin S. Smith, Member, National Labor Relations Board. (S.) Charles Fahy, General Counsel. (S.) Robert B. Watts, Associate General Counsel.

[fol. 6] *Duly sworn to by J. Warren Madden and Edwin S. Smith. Jurats omitted in printing.*

[fol. 7] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 7, 1938

The National Labor Relations Board, by its Secretary, duly authorized by Section 1 of Article VI of the Rules and Regulations of the National Labor Relations Board, Series 1 as amended, effective April 28, 1936, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," the same being Case No. C-199 before said Board, such transcript including the pleadings, testimony, and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Charge filed by International Union, United Automobile Workers of America, and sworn to May 24, 1937.

2. Supplemental charge filed by International Union, United Automobile Workers of America, and sworn to June 26, 1937.

3. Charge filed by John J. Dovey, and sworn to on June 24, 1937.

[fol. 8] 4. Charge filed by Clifford Sheldon, and sworn to June 24, 1937.

5. Charge filed by Joseph Galusky, and sworn to on June 24, 1937.

6. Complaint and notice of hearing issued by the National Labor Relations Board on June 26, 1937.

7. Answer filed by respondent, verified July 2, 1937.

8. Copy of order designating John T. Lindsey Trial Examiner, dated June 30, 1937.

9. Amendment of complaint to conform to proof.

10. Charge filed by Homer King, and sworn to June 24, 1937.

11. Amendments to paragraphs 16 and 19 of the complaint.

12. Amendment to paragraph 17 of the complaint.

13. Charge filed by International Union, United Automobile Workers of America, and sworn to July 12, 1937.

14. Answer of respondent to second amendment to complaint, verified July 14, 1937.

15. Answer of respondent to third amendment to complaint, verified July 14, 1937.

16. Amendment of complaint to conform to proof, dated July 19, 1937.

17. Motion to intervene filed by Ford Brotherhood of America, Inc., and verified July 3, 1937.

Documents listed hereinabove under items 1-17, inclusive, are contained in the Exhibits and included under the following item:

18. Stenographic transcript of the testimony before John T. Lindsay, Trial Examiner of the National Labor Relations Board, on July 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, [fol. 9] 23, 26, 27, 28, 29, and 30, 1937, including all exhibits introduced in evidence.

19. Copy of order transferring proceeding to National Labor Relations Board dated August 3, 1937.

20. Copy of caveat filed by the Ford Brotherhood of America, Incl., dated September 13, 1937. (The copy of the motion to intervene referred to in and attached to this caveat as filed with the Board, is the document described in and certified under item 17 hereof and is therefore omitted here.)

21. Copy of decision, findings of fact, conclusions of law, and order of the National Labor Relations Board issued December 22, 1937.

22. Affidavit of service of decision on Louis J. Colombo, Jr., attorney for Ford Motor Company, sworn to December 23, 1937.

23. Affidavit of service of decision on Ford Motor Company, sworn to December 23, 1937.

24. Affidavit of service of decision on International Union, United Automobile Workers of America, sworn to December 23, 1937.

25. Affidavit of service of decision on Maurice Sugar, attorney for International Union, United Automobile Workers of America, sworn to December 23, 1937.

26. Copy of petition to vacate and set aside the decision and order of the Board and for rehearing, filed by Ford Motor Company with the Board on January 3, 1938.

27. Copy of order of the Board, dated January 4, 1938, denying petition of Ford Motor Company to vacate and set aside decision and order and for rehearing.

In Testimony Whereof, the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of [fol. 10] the National Labor Relations Board in the City of Washington, District of Columbia, this 6th day of January, 1938.

Nathan Witt, Secretary, National Labor Relations Board. (Seal.)

[fol. 11] IN UNITED STATES CIRCUIT COURT OF APPEALS

SUPPLEMENTAL CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 10, 1938

Supplementing its certificate, dated January 6, 1938, of the transcript of the record in the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," the same being Case No. C-199 before the Board, the National Labor

Relations Board, by its Secretary, duly authorized by Section 1 of Article IV of the Rules and Regulations of the National Labor Relations Board, series 1, as amended, hereby certifies that the document annexed hereto is a part of the transcript of the record in the aforesaid proceeding before the Board.

Fully described the document annexed hereto is as follows:

Return of respondent to the decision and order of the Board in the aforesaid matter in response to paragraph 2(e) of such order.

In Testimony Whereof, the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 7th day of January, 1938.

Nathan Witt, Secretary, National Labor Relations Board. (Seal.)

[fol. 12–12-1] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

ANSWER TO PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed April 11, 1938

Now comes the Ford Motor Company, respondent herein, and answering the petition filed herein, respectfully shows:

1. Respondent admits the allegations of paragraphs (1), (3), and (5) of said petition.

2. Respondent denies the allegations of paragraph 2 of said petition.

3. Respondent admits the allegations of paragraph (4) of the petition herein except that it denies that full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to respondent.

[fol. 12-2] 4. Respondent denies that on the 22nd day of December, 1937, or at any other time, the petitioner (hereinafter called the Board) considered this matter, or was ever sufficiently advised in the premises, or ever reached an opinion upon the testimony and evidence that respondent had violated the National Labor Relations Act, or duly stated its findings of fact, or issued or entered the purported Order set forth in haec verba in paragraph (6) of said petition, or any other order in this proceeding directed to respondent, its officers, agents, successors or assigns.

5. Answering paragraph (7) of said petition, respondent denies that said purported order is in effect, and denies that at any time since its purported issuance it has been in effect.

6. Answering paragraph (8) of said petition, respondent denies that on the 23rd day of December, 1937, or at any other time, said purported order was served upon respondent, or upon any person authorized to accept service in its behalf, as required by Section 10 (c) of the National Labor Relations Act. Respondent alleges that on the 23rd of December, 1937, there was delivered to respondent's attorney of record in the proceeding before the Board an unsigned, unauthenticated and uncertified mimeographed document entitled in said proceeding and headed "Decision and Order", and that on the same date there was delivered to respondent at its principal office at Dearborn, Michigan, a document of the same description but denies that the same constituted service of an order as required by said Act.

7. Answering paragraph (9) of said petition, respondent admits that on January 3, 1938, it filed with the Board its petition to vacate and set aside the purported decision and order of the Board and for rehearing, which petition the Board denied on January 4, 1938, but respondent alleges that at the time of the denial of said petition the Board had [fol. 12-3] not given due and proper consideration thereto. A true copy of said petition is annexed hereto as Exhibit A and is hereby made a part hereof.

8. Respondent denies the allegations of paragraph (10) of said petition. Further answering the allegations of said paragraph, respondent alleges that on January 5, 1938, it filed with the Board its return to said purported order, a true copy of which return is annexed hereto as Exhibit B and is hereby made a part hereof; that since the purported

service of said purported order on it and since the date of said return it has not committed any act or engaged in any practice which constitutes a violation of the provisions of said purported order, and that it has no intention of committing in the future any act, or of engaging in any practice which will constitute a violation thereof, except in the respects set forth in said return.

9. Said purported order and each and every part thereof is invalid and void because unaccompanied and unsupported by any findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

10. Said purported order and each and every part thereof is invalid and void because the purported findings of fact, if any, upon which it is based are not findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

11. Said purported order and each and every part thereof is invalid and void because the purported findings of fact upon which it is based are, in material and controlling respects, not supported by evidence, within the meaning of the provisions of Section 10 of the Act, and are contrary to the evidence, and also because said purported findings of fact are inadequate, incomplete and insufficient in that material [fol. 12-4] facts which are conclusively established by the evidence have been disregarded and ignored by the Board, and also because said purported findings of fact disregard and ignore matters of current history material to the issues which are common knowledge and which the Board in the exercise of its quasijudicial powers ought to have taken into consideration.

12. The Trial Examiner by whom the Board held its hearing interrogated many of the witnesses, not in a fair, dispassionate and impartial manner for the purpose of eliciting the truth, but in such manner as to cause them to believe that he desired them to give testimony unfavorable to respondent and to withhold testimony favorable to respondent, and in such manner as to cause them to believe that they could with impunity give partial, misleading and false testimony, provided the effect produced thereby was unfavorable to respondent.

13. Said Examiner overruled proper objections of counsel for respondent to questions which counsel for the Board asked witnesses, and sustained improper objections of counsel for the Board to questions which counsel for respondent asked witnesses.

14. Said Examiner completely ignored not only the rules of evidence generally prevailing in courts of law and equity but also the fundamental principles of the law of evidence and the basic principles of justice, and accepted evidence having no probative value and worthy of no credence, and which would not be relied on by responsible persons in their own serious affairs, and which did not meet the test laid down by the Board itself (NLRB 1st An. Rep. 23) as being the kind of evidence that would affect fair-minded men in the conduct of their daily and more important business.

15. Said Examiner conducted himself at said hearing as an advocate opposed to respondent, with a view to caus- [fol. 12,5] ing the record of said hearing to be adverse to respondent, and thereby and in other respects failed to perform his duties as agent of a judicial or quasi-judicial body.

16. By reason of the matters alleged in the foregoing paragraphs 12 to 15, inclusive, said purported order and each and every part thereof is invalid and void because respondent was denied the full and fair hearing required by the Act and guaranteed by the Fifth Amendment of the Constitution of the United States.

17. From August 3, 1937, when the proceedings before the Board were transferred to it, as alleged in paragraph 5 of the petition, until December 23, 1937, when the purported decision and order of the Board were purported to have been served upon respondent, the Board communicated in no way with respondent with respect to said proceeding, and the Board at no time afforded to respondent any opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or to any proposed order.

18. By its acts and omissions as alleged in paragraph 17 hereof, the Board, without notice to respondent, departed from the normal procedure contemplated by the Rules and Regulations of the Board, and failed to accord respondent a full and fair hearing as required by the Act and the due process clause of the Fifth Amendment.

19. Neither the Board nor any member thereof was personally present at the taking of testimony or saw or heard any of the witnesses at said hearing testify.

20. Upon information and belief, neither the Board nor any member thereof read the testimony of the witnesses who testified before the Trial Examiner or read or inspected the exhibits received in evidence.

[fol. 12-6] 21. Upon information and belief, neither the Board nor any member thereof judicially weighed or appraised the evidence received at said hearing.

22. Upon information and belief the purported decision and order of the Board in substantially the form in which it was purported to have been served upon the respondent was prepared by subordinates of the Board and not by the Board or any member thereof.

23. Upon information and belief, between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to a so-called Review Section, composed of subordinates of the Board, for the purpose of analyzing such records and for the preparation of proposed findings of fact.

24. Upon information and belief, between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section for the preparation of proposed findings of fact, which were thereafter prepared by said Review Section and submitted to the Board, without notice to respondent, and without affording to respondent any opportunity to object or except thereto.

25. Upon information and belief, from the period between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to said Review Section for the preparation of proposed conclusions of fact and law, and proposed terms of an order, as well as for the preparation of proposed findings of fact.

26. Upon information and belief, that between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section,

[fol. 12-7] which thereafter prepared proposed conclusions of fact and law and proposed terms of an order, and submitted the same to the Board, without notice to respondent, and without affording to respondent any opportunity to object or except thereto.

27. The record in the proceeding before the Board submitted to said Review Section as aforesaid was not submitted pursuant to any order made by the Board and served upon or communicated to the respondent, and the Board at no time made known to respondent the identity of the persons to whom said record was so submitted.

28. Upon information and belief, after transfer of the proceedings to the Board, certain subordinates of the Board prepared proposed findings of fact, conclusions of fact, and law, and proposed terms of an order, and submitted the same to the Board, without notice by the Board to respondent and without affording to respondent any opportunity to object or except thereto.

29. By each of its acts and omissions as alleged in the foregoing paragraphs 24, 26, 27 and 28, and by all of said acts and omissions taken together, the Board departed from its own rules of procedure, by which it is provided that, where an intermediate report is prepared for submission to the Board, the same shall be served upon the respondent and opportunity afforded to except thereto.

30. Upon information and belief, neither the Board nor any member thereof read any fair condensation or analysis of the evidence received at the hearing before the Trial Examiner.

31. Upon information and belief, the Board, in making its findings of fact, conclusions and purported order, relied either solely or in part upon the proposed findings, con-
[fol. 12-8] clusions and order prepared by its subordinates and submitted to the Board as stated in the foregoing paragraphs 24, 26, 27 and 28.

32. Respondent was never accorded by the Board and did not receive any opportunity to inspect said proposed findings, conclusions and order or to object or except thereto or to point out any errors or improper statements or improper inferences or improper conclusions or im-

proper terms of order therein, or to urge that said proposed findings were not in accordance with the evidence.

33. Upon information and belief, the Trial Examiner, who saw and heard the witnesses testify at the hearing, did not prepare or submit to the Board any intermediate report, or any proposed findings of fact or any recommendations as to findings of fact, and did not inform the Board as to his opinion or belief as to the credibility of the several witnesses who testified at the hearing.

34. Upon information and belief, that the Board received from its subordinates, including its attorney who conducted the hearing on its behalf before the Trial Examiner, reports, memoranda and other communications containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; that the Board in making its order relied in part upon said reports, memoranda and communications, without personally checking or weighing or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without affording respondent any opportunity to test, refute or explain said inferences, conclusions or matters extrinsic to the record.

35. Upon information and belief, the Board in making its purported order was not, as it ought to have been, guided solely by the evidence, but in reaching its con- [fol. 12-9] clusions was improperly influenced by extraneous considerations, political and otherwise.

36. Upon information and belief, the findings contained in the purported decision and order of the Board were not its findings, and were not made as a result of judicial consideration or weighing or appraisal of the evidence by it, but were the findings of its subordinates, who under the Act had no authority to make any findings.

37. Respondent was without knowledge of the matters alleged in the foregoing paragraphs 20 to 35, inclusive, hereof until after December 23, 1937, and is without knowledge as to the identity of the subordinates of the Board referred to in said paragraphs.

38. By reason of the matters alleged in the foregoing paragraphs 17 to 37, inclusive, said purported order and

each and every part thereof is invalid and void because respondent was denied a full and fair hearing as required by the National Labor Relations Act and guaranteed by the Fifth Amendment to the Constitution of the United States.

39. By reason of the matters alleged in the foregoing paragraphs 21 to 37, inclusive, said purported order and each and every paragraph thereof is invalid and void because the Board unlawfully delegated to its subordinates powers conferred upon it by said Act, or the exercise of a substantial part thereof.

40. The Board in its purported findings of fact referred to and relied upon evidence of a patently incompetent, unreliable and prejudicial character.

41. In the making of its purported findings and order, the Board failed to consider facts and circumstances required to be considered, and its purported findings do not embrace basic facts required to support the order.

[fol. 12-10] 42. The Board included in its purported findings of fact statements which are supported by no evidence whatever and statements which misrepresent the evidence in material respects.

43. The Board phrased its purported findings of fact in language, and included in its purported findings sentences and paragraphs, not appropriate to a statement of findings of fact but calculated to and having the effect of castigating respondent before its employees and the public generally, and of supplying material for reproduction in the press.

44. The Board relied in its purported findings of fact upon evidence which the Examiner had excluded by rulings which the Board in its order affirmed.

45. The Board made its purported order and the purported findings of fact upon which its order is based without first having accorded to respondent the substance of a full and fair hearing, the hearing in this proceeding being inadequate in the respects set forth in the foregoing paragraphs 12 to 39, inclusive.

46. By reason of the matters alleged in the foregoing paragraphs 40 to 45, inclusive, and other matters, said pur-

ported order is invalid and void because the Board, in making said purported order and the purported findings of fact upon which said order is based, did not act in a judicial or quasi-judicial manner as is required by Section 10 of the Act and by the due process clause of the Fifth Amendment to the Constitution.

47. Upon information and belief the purported decision and order of the Board was not its order but was the order of its subordinates, and the purported conclusions of the Board were not the conclusions of the Board made as a result of its judicial consideration or weighing and ap- [fol. 12-11] praising of the evidence but were the conclusions of its subordinates who, under the Act, had no authority to make said order or conclusions.

48. The Board arbitrarily refused to set aside its purported order and grant to respondent a rehearing for the purposes set forth in the above-mentioned petition filed with the Board on January 3, 1938, and thereby abused its discretion.

49. Said purported Order, and each and every part thereof, is invalid and void because none of the acts found by the Board to have been done by respondent occurred in commerce, or burdened or obstructed commerce or the free flow of commerce, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act when construed in the light of constitutional limitations upon the powers of Congress, including the Tenth Amendment to the Constitution, and because the Act, if construed to apply to the acts found by the Board to have been done by respondent, is, as so construed, unconstitutional and void in that it attempts to regulate matters not within the powers conferred upon Congress by the Constitution and violates the Tenth Amendment thereto, and because the acts found by the Board to have been done by respondent are, individually and collectively, so minor in character, scope and duration that their possible effect upon interstate commerce is only indirect, remote, incidental and collateral.

50. The findings of the Board are not supported by the weight of the evidence, and are therefore void and invalid

in that Section 10(e) of the National Labor Relations Act, in so far as it provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" violates Article III, of the Constitution of the United States, [fol. 12-12] in that it purports to grant judicial power to a non-judicial tribunal whose members hold office for limited terms, for terms not solely dependent on good behavior, and are removable otherwise than by impeachment, and which tribunal is neither the Supreme Court nor an inferior court ordained and established by the Congress.

51. The provision contained in Section 10(e) of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", if so interpreted as to require the Court to enter a decree enforcing provisions of the order without its weighing the evidence or giving any consideration thereto other than for the purpose of seeing whether there is some evidence to support the order and the purported findings of fact upon which based, without consideration of any other facts or circumstances of equitable cognizance, and without considering for itself whether the conduct of the respondent is sufficient to warrant the entry of a decree of enforcement having the effect of an injunction issuing out of a court of equity, and without the exercise of any judicial discretion whatever, is repugnant to Article III of the Constitution of the United States whereby the judicial power of the United States is expressly and exclusively conferred upon the Supreme Court of the United States and such inferior courts as Congress may from time to time establish, and to the provisions of Article V of the Amendments to the Constitution of the United States, whereby it is provided that no person shall be deprived of life, liberty or property without due process of law.

52. Paragraph 1 of the purported order herein exceeds in scope any order which the Board may lawfully make under the National Labor Relations Act on the record and findings in the proceedings before it.

[fol. 12-13] 53. By reason of the matters and things alleged in paragraph 8 hereof, no existing case or controversy exists between the Board and respondent in respect of paragraphs 1(a), (b), (c), (d) and (f) of the Board's purported order within the judicial power of the United States as

defined in Article III of the Constitution of the United States.

54. Paragraph 1(a) of said purported order is invalid and void because the purported findings of the Board that respondent discharged 29 of the more than 80,000 persons employed at its River Rouge plant under circumstances constituting an unfair labor practice is insufficient to support any order directing respondent to cease and desist from discharging any of its employees in the future.

55. Paragraph 1(d) of said purported order is invalid and void because there is no finding of fact and no evidence to support any finding of fact that the persons found by the Board to have been threatened, assaulted or beaten were employees of respondent.

56. Paragraph 1(d) of said purported order, in so far as it orders respondent to cease and desist from in any manner interfering with, restraining or coercing any person other than employees of respondent, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

57. Paragraph 1(d) of said purported order is invalid and void in that said paragraph purports to deprive respondent of its lawful right to take appropriate action to eject trespassers from its property and to prevent its employees from engaging in acts on or in the vicinity of its property which would be calculated or would tend to interfere with the ingress and egress of persons to and from respondent's plant and to cause breaches of the peace among employees of respondent.

[fol. 12-14] 58. Paragraph 1(d) of said purported order is invalid and void because the Act is inapplicable to acts of physical violence.

59. Paragraph 1(e) of said purported order is invalid and void because not authorized by any provision of the Act when construed in the light of the requirements of the First Amendment to the Constitution and because, if the Act be construed to authorize said Paragraph 1(e), the Act is to that extent unconstitutional and void as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

60. Paragraph 1(f) of said purported order is invalid and void because, being a restatement of the provisions of Section 7 and Section 8(1) of the Act, it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact.

61. Paragraphs 2(a) and 2(b) of said purported order are invalid and void because they are not supported by any finding of the Board that the persons named in said paragraphs have been reasonably diligent in seeking employment elsewhere or that said persons have not had and rejected opportunities to obtain substantially equivalent employment elsewhere or that said persons have ever requested respondent to reinstate them.

62. Paragraph 2(b) of said purported order is invalid and void because it fails to provide that the payments to be made by respondent to each of the persons named in paragraph 2(a) of said order shall equal the amount which each such person would have earned as wages during the period from the date of his discharge to the date of the offer of reinstatement, less any amount which, with the exercise of reasonable diligence, he would have earned during that period and any amount received by him from any source by reason of his unemployment, and thereby fails to effectuate the policies of the Act, and because it fails to provide any [fol. 12-15] method or procedure for the determination of the amount to be paid by respondent to the persons referred to therein.

63. Paragraphs 1(a), 1(b), 1(c) and 1(d) of said purported order, in so far as they order respondent to cease and resist from engaging in certain practices with respect to any labor organization or the members of any labor organization other than the particular labor organization named in each of said respective paragraphs, are invalid and void because they are unsupported by the purported findings of fact and exceed the issues raised in the proceeding.

64. Paragraph 2(c) of said purported order is invalid and void because there is no evidentiary finding by the Board, and no evidence to support any evidentia y finding, that the action ordered therein to be taken will effectuate the policies of the Act, and because such action will not

effectuate the policies of the Act, and because said paragraph fails to set forth in words and figures the notice required to be posted by respondent, and because the Act, when construed in the light of the requirements of the Fifth Amendment to the Constitution, does not authorize the Board to order respondent to state that it has heretofore engaged in any unfair labor practice.

Wherefore, the respondent prays that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with directions to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent.

Dated April 11, 1938.

[fol. 12-16] EXHIBIT "A" TO ANSWER

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

PETITION OF FORD MOTOR COMPANY TO VACATE AND SET ASIDE DECISION AND ORDER AND FOR REHEARING

Now comes Ford Motor Company and, reserving to itself all exceptions and objections to the jurisdiction of the Board in the above-entitled matter and to the validity of its decision and order herein upon constitutional grounds, upon the ground that in making the same the Board exceeded its statutory authority, upon the ground that it failed to follow the procedure laid down in the National Labor Relations Act, and upon the grounds that its findings of fact are unsupported by substantial evidence and are contrary to the weight of the evidence and are insufficient to support the order made, files herein with the Board its petition to vacate and set aside the decision and order herein, and for

a rehearing, and files copies of said petition with the Regional Director of the Board for the Seventh Region.

[fol. 12-17] I

The Policy of the Company

The findings and order of the Board are based upon a misapprehension of the policy of the Ford Motor Company and its founder, Henry Ford, towards the employees of the Company. It is a matter of common knowledge that the Company and its founder have been pioneers in the payment of high wages, reduction in the hours of labor and the improvement of working conditions. This policy has been carried out without compulsion from any outside force and long antedates the passage of the National Labor Relations Act.

The Board itself in its report refers to statements made by Mr. Ford from time to time as "indicative of the respondent's attitude" because "coming from the respondent's dominant figure." The excerpts therefrom quoted in the report makes it plain that Mr. Ford is of the opinion that the employees of the Company are better off outside a union than in one—an opinion which would seem to be justified by the facts stated above. Whether this is so or not, which it is not for the Board to determine, Mr. Ford in so expressing himself was exercising the right of free speech guaranteed by the Constitution of the United States, with which the Board has no authority to interfere, as it has attempted to do in its order.

At the same time, the Company and its founder have recognized the right of every employee to join a union or not, as he pleases. This is demonstrated by the evidence offered by counsel for the Board. Among the documents so offered was an interview given by Mr. Ford to the North American Newspaper Alliance on April 29, 1937, reprinted and disseminated by the Company among its employees (Board Exhibit 111). In the course of this interview Mr. Ford was asked the following question and made the following answer:

[fol. 12-18] "But do you propose to put up stiff opposition to any group that undertakes to bring your workmen into labor unions?" Ford was asked.

"I have never sought to prevent our men from joining any association—religious, racial, political or social," Ford replied. "No one who believes in American freedom would do that. When our men ask about unions, I give them the same advice as when they ask about any of the other schemes that are always being aimed at men's wages. I say to them: 'First, figure out for yourself what you are going to get out of it. If you go into a union, they have got you, but what have you got?'"

"We think our men ought to consider whether it is necessary for them to pay some outsider every month for the privilege of working at Ford's. Or, whether any union can do more for them than we are doing."

Other parts of the interview are quoted in the report, but the excerpt quoted above was omitted therefrom. It is, nevertheless, the only portion of the interview which is relevant to the policy of the Ford Motor Company on the subject of interference or non-interference with the liberty of employees to join a union or not, as they wish. This is a plain and unambiguous statement of the attitude of the respondent and its founder towards unions, namely, that in their opinion its employees are better off out of a union than in it, but that they may join if they choose.

In view of the introduction into evidence by the Board of Mr. Ford's statement of policy, it seemed unnecessary for the respondent to introduce additional evidence with respect thereto. Upon rehearing, however, the respondent is prepared to and will prove that the policy and practice of the Company is one of non-interference and that those entrusted with the employment and discharge of its employees have been directed not to discriminate either in favor of or against members of any labor union.

[fol. 12-19] II

Conditions in Michigan

The decision and order reflect a failure on the part of the Board to take into account the conditions existing in Michigan at the time of the events treated in the report. These conditions provide a necessary background for a true understanding and fair appraisal of the events treated in the report.

For a period of six months prior to May 26, 1937, there had been active in the State of Michigan a group of men representing the Committee for Industrial Organization (hereinafter called the C. I. O.) and its affiliate, International Union, United Automobile Workers of America (hereinafter called the U. A. W.), who had deliberately violated the law of the State of Michigan against trespass on private property, and had openly expressed their intention and purpose of so doing.

The policy adopted and openly avowed by the C. I. O. and U. A. W. was that, in the very midst of an era of production and prosperity, the workers in a plant should not merely lay down their tools and cease to work, but should occupy the plant and prevent those who desire to work from doing so.

In the epidemic of C. I. O. and U. A. W. sit-down strikes that swept the State of Michigan, industrial plants were seized by force and their production suspended. Men wishing to work were forcibly prevented from doing so and even forcibly restrained from leaving the seized plants. The Governor of the State of Michigan announced that ordinary agencies for law enforcement could not or would not function. Whether the Governor was forced to this by the action of C. I. O., or whether the fault was his own, is not the question here.

The important point here is that industrial plants were in fact seized and their production was in fact suspended, that [fol. 12-20] men wishing to work were in fact thrown out and their families placed on relief, that the treasury of the State was in fact depleted to pay for the relief, and that purchasing power was destroyed.

Under these circumstances, the Ford Motor Company determined that in so far as it lay within its power and control over its own property, and in so far as it could do so consistently with obedience to all laws, whether local, State or Federal, it would resist any such attempted seizure of its plants by C. I. O. or U. A. W. organizers as had been experienced by General Motors Corporation and Chrysler Corporation, and would, above all, protect those of its workers who might desire to continue to work, from being forcibly prevented from doing so.

That this was a serious problem, was apparent not merely from the existence of the facts which we have mentioned, but from the concrete evidences of the violent consequences

that occurred in the history of the State of Michigan during that six months' period. To cite but a single example, at Flint, Michigan, there was a pitched battle between police and pickets, at which shots were fired and men killed, while workingmen, who were unlawfully occupying the plant itself at the instigation of C. I. O. and U. A. W., tore up machinery and hurled it as missiles through the windows.

At the original hearing the respondent, believing that the history of the times would be taken into account by the Board, did not tender evidence on the subject. The respondent now offers to prove these facts upon rehearing.

III

Occurrences of May 26, 1937

By reason of the aforesaid circumstances, the respondent and its employees who wished to remain at work had, for some time prior to May 26, 1937, anticipated an invasion [fol. 12-21] of the property and plant of the Company by U. A. W. and an effort forcibly to stop its operation by means of a sit-down strike. In repeated demonstrations by U. A. W., its marchers or adherents carried banners or placards bearing such legends as "General Motors now. Ford next.", and "Chrysler now. Ford next." The respondent, therefore, rightly and properly made preparations to resist any such invasion. The only instructions given were instructions to prevent such invasion and sit-down strike.

It is the contention of the respondent that the Board's findings that the respondent was responsible for the violence which ensued are without support in the record. The remarkable fact about the episode of May 26, when viewed in the light of its background, is as to how little breach of the peace in fact happened.

In other plants in the State of Michigan, similar factors had given rise to breaches of the peace of the greatest violence lasting over periods of days and weeks. At the Ford plant, the matter passed off with a few fist fights, which, however deplorable, should not blind the Board to a judicial recognition of their comparative insignificance.

The directions of the responsible officials of the Ford Motor Company were that if the C. I. O. or U. A. W. representatives wished only to distribute pamphlets, they should not in any way be interfered with, but that they

should not be permitted to enter upon Ford property. These directions were given in the light of the experience at General Motors, Chrysler and other plants in Michigan, at which representatives of the C. I. O. and U. A. W., or employees instigated by them, had succeeded in actually taking over the plants and disrupting production.

That a trespass on Ford property was bound to lead to breach of the peace, will be established by evidence of the intense feeling existing at the time on the part of the employees of the Ford plant who wished to avoid the loss of [fol. 12-22] their jobs and wages, and the consequent impoverishment of their wives and families, such as had been suffered and protested against by men who had been thrown out of work through similar interruptions at General Motors, Chrysler and other plants.

The C. I. O. and U. A. W. representatives had been stating for some days that they would march out to the Ford plant. This inevitably gave rise both to defensive preparations on the part of the Ford Service Department, whose job is to guard the premises of the largest industrial plant in the world, and also to a feeling of tension and suppressed excitement on the part of its members which might easily and naturally, under such provocation, have led to real violence. That this was avoided is, under the circumstances, a testimonial to the determination of the Ford Motor Company not to resort to brutality, but at all costs to avoid it.

Throughout the period of the rough and tumble but evidently isolated and sporadic brawls outside the plant, the members of the Service Department did not move out to aid the individual Ford employees who happened to be participating therein, or to molest or attack the C. I. O. and U. A. W. representatives who had provoked them. So far as the Company itself is concerned (and the Company is the sole respondent in this proceeding), it is respectfully submitted that this is the one significant and outstanding fact, and that in the light of it the picture painted by the report of the Board is erroneous and unfair to the Company, and should be corrected.

Of secondary importance is the fact that numerous of the descriptive paragraphs of the report of this Board, lurid as they are as to detail, are based on hearsay and surmise. Since the date of the hearing herein, the facts have been clarified by the decision of the Supreme Court

of Michigan that even the most severe injury (that to Merriweather) was not felonious, but was a case of simple assault and battery not intended to cause serious bodily injury.

[fol. 12-23] If rehearing be granted herein, the respondent is prepared to offer and will offer evidence that the acts of violence were not committed at the direction or with the authority of the respondent.

IV

Situation since May 26, 1937

Since the close of the hearings herein representatives of C. I. O. and U. A. W. upon seven separate occasions have again visited the vicinity of the Ford plant for the purpose of distributing literature. On each occasion, as on May 26, the literature was essentially scurrilous in character and libelous of the Company and of Mr. Ford. And, as on May 26, no adequate remedy at law existed in favor of the Company or Mr. Ford, for the literature was circulated by persons of no financial responsibility, acting at the instigation and under the direction of the lawless groups known as C. I. O. and U. A. W.

Upon no one of these occasions did said persons undertake to enter upon the premises of the respondent. On each of said occasions, as on May 26, the Company had made preparations to resist such entry, if attempted. But on each of these occasions, since no entry was attempted, the persons making distribution of literature were not interfered with or molested by the Company or its employees.

Upon a rehearing, the respondent will offer evidence to prove these facts.

In view of the foregoing circumstances, it is respectfully submitted that the occurrences of May 26, 1937, represent matters properly to be dealt with solely by the local authorities of the State of Michigan and cannot be made the predicate for any injunction order in the future.

[fol. 12-24]

V

The So-called Ford Brotherhood of America, Inc.

The statements in the report that "the respondent fostered a 'dummy' labor organization of its own choice—the Ford Brotherhood of America, Inc." and "that the

respondent has dominated and interfered with the formation and administration of this organization and has contributed support to it", are unsupported by the record and are contrary to the facts. In view of the complete failure of the proof to support this charge, it seemed unnecessary for respondent to introduce any evidence in respect thereof.

The facts with respect to the Brotherhood are that its organization was instigated by an individual not employed by or connected with the Company; that this individual obtained the cooperation of a group of employees of respondent, who thereupon organized the Brotherhood and solicited membership therein within the plant; that when such solicitation came to the knowledge of responsible officials of the Company, they promptly, on June 15, 1937, instructed those employees most active in the Brotherhood to cease all solicitation within the plant and to refrain at all times and places from representing that the Company was supporting the Brotherhood or had anything to do with it; that respondent instructed its plant superintendents and other supervisory employees that no activity on behalf of the Brotherhood should take place within the plant; and that such instructions were carried out by all persons within the control of respondent.

Upon a rehearing, the respondent will offer evidence to prove these facts.

[fol. 12-25]

VI

The Ford Service Department and Other Groups of Ford Employees

Paragraph 1(c) of the order herein is without support in the evidence and is based upon a misapprehension of the facts. The Board's purported finding (p. 55) that "the record leaves no doubt that the Service Department has been vested with the responsibility of maintaining surveillance over Ford employees, not only during their work but even when they are outside the plant, and of crushing at its inception, by force if necessary, any sign of union activity", is unsupported by the evidence and contrary to the fact, as is the finding that its membership has been greatly enlarged (p. 22).

The function of the Service Department is to guard and patrol the gates and the plant for the purpose of preserving order, preventing thefts, keeping out trespassers, and the

like. During 1936, this department averaged a personnel of approximately 300 men, and did not at any time during 1937 exceed 400 men. As appears upon the face of the report, the grounds of the respondent's River Rouge plant covered over 1,096 acres and the buildings have a floor area of over 7,250,000 square feet. As appears upon the face of the report, said plant gives employment to more than 80,000 men. It is respectfully submitted that a force of from 300 to 400 men to patrol and police what is the equivalent to a city with a popultaion of nearly 100,000 people is not an excessive force for the legitimate purposes for which said Service Department is maintained. The Service Department performs only such duties outside the plant grounds as are necessary to the protection of the plant, and the purported conclusion of the Board that this department is "vested with the responsibility of maintaining surveillance over Ford employees not only during their work but even [fol. 12-26] when they are outside the plant" is contrary to the fact.

The Board has further referred to "vigilante" groups. The respondent is informed that the only groups of employees that could possibly conform to this description were groups that informally joined together for the sole purpose of resisting any attempt to inaugurate a sit-down strike inside the plant.

Upon rehearing the respondent is prepared to offer proof of the foregoing facts.

VII

Discharges

In a plant employing 80,000 men, the Board has found that over a period of 8 months 29 men were discharged for being members of a union. The smallness of the number (1 to every 2,500) is itself eloquent that the Company does not in fact follow a policy of discriminating against union members.

And as to most of the 29 men found by the Board to have been discharged as a part of an alleged policy of discrimination against unions, but two witnesses appeared—the man himself and his foreman. The Supreme Court of the United States, in its decision in Labor Board v. Jones & Laughlin, 301 U. S. 1, at page 45, said:

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right to discharge when that right is exercised for other reasons than such intimidation and coercion."

[fol. 12-27] It is respectfully submitted that the Board is not justified in making its findings upon the unsupported evidence of the men discharged, particularly in the light of the policy of the Company as hereinbefore reviewed and as embodied in the statement of Mr. Ford introduced in evidence by counsel for the Board itself. Upon rehearing, the respondent will offer further proof (1) in corroboration of the foremen; (2) that the number of employees which the Company is charged with having discharged for union activities or sympathies represented but a small fraction of the total number of employees discharged within the same period, and (3) that within the knowledge of the Company and its responsible officials, there were, at the time such discharges took place, many employees of the respondent who were members of labor unions, who had been employees of the Company for many years, who are still in its employ and whose service of employment has never been interfered with by reason of such membership.

VIII

Absence of a Fair Hearing and Due Process

Section 10(c) of the National Labor Relations Act requires the Board to make findings of fact. Section 32 of the Rules and Regulations of the Board provides for the preparation of an intermediate report by the trial examiner which "shall contain (a) findings of fact, separately stated and numbered, and (b) recommendations as to what disposition of the case should be made," and for the service of said intermediate report upon the respondent. Section 34 provides for the filing of exceptions to said intermediate report. The Rules and Regulations further contemplate, as they must, briefs and oral argument upon said exceptions.

No intermediate report was ever served upon the respond-

ent in this case, and no opportunity to except thereto af-
[fol. 12-28] forded. No briefs or oral argument were received by the Board. The decision and the order of the Board contain no findings of fact within the meaning of the Act and, therefore, the order is without support in law.

By reason of the foregoing, the respondent has been denied a fair hearing both within the meaning of the statute and in violation of the Fifth Amendment to the Constitution of the United States.

Wherefore, respondent respectfully prays that the Board vacate and set aside its decision and order herein and grant a rehearing hereof, and pending such rehearing, grant a stay of the order entered herein.

Respectfully submitted, Louis J. Colombo, Attorney for the Respondent Ford Motor Company. Frederick H. Wood, Wm. D. Whitney, Henry G. Walter, Jr., Harmon Duncombe, of Counsel.

January 3, 1938.

[fol. 12-29] EXHIBIT "B" TO ANSWER

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-199

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

RETURN OF RESPONDENT FORD MOTOR COMPANY TO PARAGRAPH 2(e)

Now comes Ford Motor Company (hereinafter called the respondent), and reserving to itself all exceptions and objections to the jurisdiction of the Board in the above-entitled matter and to the validity of its decision and order herein upon constitutional grounds, upon the ground that in making the same the Board exceeded its statutory authority, upon the ground that in the making of said decision and order it failed to follow the procedure laid down in the Act, upon the ground that its purported findings of fact are unsupported by substantial evidence and contrary to the

weight of the evidence, and are insufficient to support the order made, and upon any and all other grounds whatsoever, makes and files with the Regional Director of the Seventh Region the following return to the decision and order herein in response to paragraph 2(c) of such order;

[fol. 12-30] Paragraph 1(a). The respondent has never discouraged membership in International Union, United Automobile Workers of America, or any other labor organization of its employees by discharging or refusing to reinstate any of its employees by reason of membership therein, or in any other manner discriminated in regard to their hire or tenure of employment or any term or condition of employment, because of membership in such organization, or on account of activity in behalf of or sympathy toward any such organization, contrary to Section 8(3) of the National Labor Relations Act, and the respondent has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(a) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(b). The respondent has never dominated or interfered with the formation or administration of Ford Brotherhood of America, Inc., or of any other labor organization of its employees, or contributed financial or other support thereto, and has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(b) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(c). The respondent has never organized, maintained, supported or assisted "vigilante" or similar groups, or employed or used such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America, or any other labor organization of its employees, and has no intention of so doing in the future. The respondent, nevertheless, protests that para- [fol. 12-31] graph 1(c) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(d). The respondent has never threatened, assaulted, beaten, or in any other manner interfered with,

restrained or intimidated, directly or indirectly, members of International Union, United Automobile Workers of America, or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant, and has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(d) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence. Moreover, the respondent asserts its lawful right to prevent entry of undesirable persons upon its plant grounds and to eject trespassers from its plant or its plant grounds, to maintain law and order therein, and by all lawful means to protect the rights of itself and its employees from attack.

Paragraph 1(e). This paragraph appears to be predicated upon the views of Mr. Henry Ford as expressed in his statements which were disseminated by the respondent among its employees and were reviewed in the decision. Such review in the decision of the Board is incomplete and consequently unfair. It therein appears that Mr. Ford is of the opinion that the employees of the respondent are better off outside a union than in one—an opinion which would seem to be justified by the history of the well-being of the employees of the respondent, which has always been a pioneer in the payment of high wages and the improvement of working conditions. Whether this is so or not, which is not for the Board to determine, Mr. Ford in so expressing himself was exercising the right of free speech guaranteed [fol. 12-32] by the Constitution of the United States, with which the Board has no authority to interfere, as it has attempted to do in its order. At the same time, the respondent and its founder have recognized the right of every employee to join a union or not, as he pleases. The respondent, therefore, respectfully advises the Board that it will not comply with paragraph 1(e) of its order herein.

Paragraph 1(f). The respondent is advised by counsel that paragraph 1(f) of the order is a restatement of the provisions of Section 8(1) of the Act. The respondent has never interfered with, restrained or coerced its employees in violation of said Section 8(1) and has no intention of so doing. The respondent, nevertheless, protests that para-

graph 1(f) of the order is unjustified by the facts and unsupported by evidence and, being a restatement of Section 8(1) of the Act, exceeds in scope any order that the Board may lawfully enter on the basis of its purported findings, its conclusions of law or the record in the proceeding.

Paragraphs 2(a) and 2(b). The respondent respectfully advises the Board that it will not comply with paragraphs 2(a) and 2(b) of the order herein for the reasons that they are unjustified by the facts and unsupported by evidence, and that in the entry of the same the Board exceeded both its constitutional and its statutory authority.

Paragraphs 2(c) and 2(d). Although it is the intention of the respondent, as hereinbefore set forth, to obey in the future, as it has in the past, the provisions of the National Labor Relations Act upon which the decision and order purport to be based, it respectfully advises the Board that it will not post any notices, in compliance with paragraphs [fol. 12-33] 2(c) and 2(d) of the order herein for the reasons that said paragraphs are unjustified by the facts and unsupported by the evidence, that respondent has not in the past been guilty of any violations of the provisions of the National Labor Relations Act, and that in making said paragraphs of its order the Board exceeded both its constitutional and its statutory authority.

Paragraph 2(e). The foregoing constitutes the response of the Ford Motor Company to paragraph 2(e) of the decision and order herein.

January —, 1938.

Ford Motor Company, by P. E. Martin, Vice-President.

[fol. 13] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

NOTICE OF MOTION—Filed May 2, 1938

To Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

SIRS:

Please Take Notice that the annexed verified motion for leave to withdraw petition for enforcement and transcript of record without prejudice, and proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, at the Federal Building in the City of Covington, Kentucky, on the 3rd of May 1938, at 10:00 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as counsel can be heard.

Charles Fahy, General Counsel, National Labor Relations Board.

Dated, April 29, 1938.

Receipt of the within notice, together with two copies of the annexed motion, on the 29th day of April 1938, is hereby acknowledged.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, by Douglas L. Hatch, Attorneys for Ford Motor Company.

[fol. 14] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

MOTION FOR LEAVE TO WITHDRAW PETITION FOR ENFORCEMENT AND TRANSCRIPT OF RECORD WITHOUT PREJUDICE—Filed May 2, 1938

Now comes the National Labor Relations Board, petitioner in the above-entitled cause, by its attorney, and moves this Court for leave to withdraw its petition for enforcement and the transcript of the record herein, without prejudice, and in support of its motion respectfully shows as follows:

1. On December 22, 1937, pursuant to Section 10(c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166) and to Section 38(b) of Article II of the Board's Rules and Regulations, the National Labor Relations Board issued its decision and order (R. 2094-2161) in the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," known upon the Board's files as Case No. C-199. Thereafter, on January 7, 1938, pursuant to Section 10(e) of the Act, the Board filed in this Court its petition for enforcement of its order and a certified transcript of the record of the said proceeding before the Board, including a copy of the Board's decision and order (R. 1).

2. On April 11, 1938, Ford Motor Company, respondent [fol. 15] herein, filed with this Court its answer to the Board's petition for enforcement, alleging, inter alia, that the Board's order was void and contrary to the Fifth Amendment in that the respondent was never accorded by the Board an opportunity to inspect proposed findings by the Board, or to except thereto, or to urge that such findings were not in accordance with the evidence, and, upon information and belief, that the Board's decision and order were made by subordinates and that neither the Board nor any member thereof judicially weighed or appraised the evidence. On the same date, the respondent filed a motion, based upon Morgan v. United States, 298 U. S. 468, for an order requiring the Board to reply to the above allegations set forth

in respondent's answer. On April 15, 1938, the Court entered an order passing this motion of respondent to the hearing, and on April 18, 1938, the Court assigned the cause for hearing on May 9, 1938. Thereafter, on or about April 27, 1938, the respondent filed in this Court a petition, based upon the decision of the Supreme Court in the second Morgan case (Morgan v. United States, decided April 25, 1938, No. 581), for commission to take depositions of Board members and subordinates who could give testimony material to the allegations contained in respondent's answer, and for a continuance of the hearing of the cause pending the taking of such depositions.

3. In the supervening decision of the Supreme Court in the second Morgan case, a rate-fixing order of the Secretary of Agriculture was held void for lack of the "full hearing" required by the Packers and Stockyards Act (42 Stat. 159; 7 U. S. C. §§ 181-229), where the order was based upon the Secretary's ex parte "reactions" to the findings of subordinates in the Bureau of Animal Industry, whose representatives had conducted the proceedings by the Government, where no complaint had initiated the proceeding, and where, although they requested proposed findings and argument thereon, the appellants were neither fairly advised of the Government's claims nor afforded a fair opportunity to be [fol. 16] heard upon the Government's concrete proposals. A copy of the Supreme Court's opinion is annexed as Exhibit A to the respondent's petition for a commission.

4. The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the Morgan case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable. In this manner questions concerning the validity of the Board's procedure will

be obviated on the transcript of record, if one is later certified to the Court. The respondent will not be prejudiced in any way. Indeed, the opportunity to file exceptions to proposed findings and to urge objections thereto before the Board is the very opportunity which in its answer the respondent complains it was denied.

5. The respondent has not asked for affirmative relief against the Board and may not do so under the Act. Therefore, since withdrawal of the petition will in no way prejudice the respondent, the Board has an absolute right to such withdrawal without prejudice to the filing of a new petition. Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93 and authorities there cited; Jones v. Securities & Exchange Commission, 298 U. S. 1, 19-20.

Wherefore the Board, by its attorney, prays that this motion forthwith be granted.

Charles Fahy, General Counsel, National Labor Relations Board.

Dated April 29, 1938, Washington, D. C.

[fol. 17] *Duly sworn to by Charles Fahy. Jurat omitted in printing.*

[fol. 18] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

NOTICE OF MOTION TO CONSOLIDATE CAUSES—Filed May 4, 1938

To Charles Fahy, Counsel for National Labor Relations Board, Shoreham Building, Washington, D. C.

Please Take Notice that on the 9th day of May, 1938, at 9:00 A. M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion and proposed order thereon to consolidate the above-entitled causes will be presented to

the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine and Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

Due service acknowledged this — day of May, 1938.

—— ——, Attorney for National Labor Relations Board.

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

MOTION TO CONSOLIDATE CAUSES—Filed May 4, 1938

Comes now Ford Motor Company, respondent in the first above-entitled cause and petitioner in the second above-entitled cause (hereinafter called the Company), and respectfully shows to the Court as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board (hereinafter called the Board) filed with this Court in the first above-entitled cause its petition for the enforcement of a purported order of the Board.

2. On May 4, 1938, pursuant to Section 10(f) of said Act, the Company filed with this Court in the second above-entitled cause its petition for a review of and to set aside a purported order of the Board.

[fol. 20] 3. The purported order referred to in paragraph 1 hereof and the purported order referred to in paragraph 2 hereof are the same order, which order was purported to be made and entered on December 22, 1937, in a proceeding known upon the records of the Board as Case No. C-199, the title thereof being "In the Matter of Ford Motor Com-

pany and International Union, United Automobile Workers of America", and was directed to the Company.

4. Paragraph 10(f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 160) provides that in the event that any person aggrieved by a final order of the Board shall seek a review of such order in a Circuit Court of Appeals of the United States, a copy of the petition seeking such review shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the Court a transcript of the entire record in the proceeding, certified by the Board. The transcript of record thus required to be certified by the Board and filed in the second above-entitled cause has already been certified by the Board and filed with this Court in the first above-entitled cause.

5. On April 4, 1938, the Company filed with this Court in the first above-entitled cause its petition for leave to adduce additional evidence. The allegations and prayer of said petition are equally applicable to the second above-entitled cause.

6. On April 27, 1938, the Company filed with this Court in the first above-entitled cause its petition for a commission to take depositions of witnesses. The allegations and prayer of said petition are equally applicable to the second above-entitled cause.

7. On May 2, 1938, the Company filed with this Court and served upon the Board interrogatories in the first above-
[fol. 21] entitled action. Said interrogatories are equally applicable to the second above-entitled cause.

8. Both of the above-entitled causes present to the Court for determination the same issues of fact and law, and the consolidation thereof will avoid unnecessary costs and delay and will be reasonable.

9. On April 29, 1938, the Board served upon counsel for the Company notice of a motion in the first above-entitled cause for leave to withdraw without prejudice its petition to enforce its purported order and the transcript of record filed in said cause with this Court. The Company believes that the Board is not entitled to the relief so requested and will resist the Board's motion. In order that there may be no doubt that the Company is entitled to have the Court pass upon its request that the Board's purported order

be set aside, the Company has, as stated in paragraph 1 hereof, filed in the second above-entitled cause its petition to set aside the order of the Board.

Wherefore, pursuant to Revised Statutes § 921 (28 U. S. C. § 734), the Company respectfully moves this Court for an order directing that the above-entitled causes be consolidated, that the transcript of record filed in the first-above-entitled cause be deemed to be filed in the consolidated cause, and that said petition for leave to adduce additional evidence, said petition for a commission to take depositions of witnesses and said interrogatories be deemed to be filed also in the consolidated cause, and for such other and [fol. 22] further relief as may be just and proper.

Dated May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

[fol. 23] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fol. 24] [File endorsement omitted]

[fol. 24-1] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

MEMORANDUM IN OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS BOARD FOR LEAVE TO WITHDRAW WITHOUT PREJUDICE ITS PETITION FOR ENFORCEMENT AND TO ALSO WITHDRAW TRANSCRIPT OF RECORD—Filed May 5, 1938

The Board has moved to withdraw its petition for enforcement of its order against respondent and to also withdraw the certified transcript of the record in the proceedings before it now on file in this Court. While under certain circumstances (not here existent) and when authorized by statute or an appropriate rule of Court, a plaintiff may move for the dismissal of his case, without prejudice, we know of no case which holds that a plaintiff may "with-

draw" a petition once filed or a suit once instituted. Equally unprecedented is the Board's motion to withdraw the transcript of the proceedings before it, a part of the permanent records of this Court.

I

The Board's Motion to Withdraw its Petition Should be Denied.

1. The Board is not entitled, as of right, to withdraw its petition.

The proceeding now before the Court is statutory. The Act provides that upon the entry of an order by the Board [fol. 24-2] either the Board [Sec. 10(e)] or "any person aggrieved" by such order [Sec. 10(f)] may obtain a judicial review thereof by a Circuit Court of Appeals of appropriate territorial jurisdiction. If the Board is the moving party, the jurisdiction of the Court is invoked by the filing of a petition "for the enforcement of such order". If the respondent in the proceeding before the Board is the moving party, the jurisdiction of the Court is invoked by filing a petition "praying that the order of the Board be modified or set aside". In either event the jurisdiction and powers of the Court are the same [Secs. 10(e) and (f)] and are defined by Secs. 10(e) and 10(f) of the Act. In either event the power of the Court is limited to the entry of "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board". No answer is required.

Thus, under the procedure provided by the Act, whenever either party to the proceeding before the Board invokes the jurisdiction of the Court, the other party, without answer, is entitled as a matter of right to affirmative relief if justified by the record before the Court. Had the jurisdiction of the Court been first invoked by the respondent in this case through the filing of a petition "praying that the order of the Board be modified or set aside" and should the Court be of the opinion that the order was valid, its decree would not be one of dismissal but it would be compelled under Sec. 10(e) of the Act to enter an affirmative decree enforcing the order, and the Board would have the right to insist upon the entry of such decree. Conversely, when the Board invokes the jurisdiction of the Court by

a petition "for the enforcement" of an order, if the Court, after hearing, reaches the conclusion that the order of the Board is invalid, the respondent is entitled, not merely to a decree of dismissal, but to the entry of an affirmative decree setting the order aside. This the Act accords to respondent as a matter of right, without the filing of a cross-petition. The case stands as though it had itself [fol.24-3] invoked the jurisdiction of the Court by filing a petition to set the order aside.

The Act on its face thus requires the entry of an affirmative decree granting relief to whichever party is entitled to it, whether petitioner or respondent, and without answer by the latter. The Board in its motion (para. 5) in effect concedes that its motion is predicated wholly upon the lack of any right of the respondent in this proceeding to affirmative relief, saying:

"The respondent has not asked for affirmative relief against the Board and may not do so under the Act."

To this the Act as analyzed above affords a complete answer. By the mere filing of its petition the Board itself invoked the jurisdiction of the Court in a statutory proceeding providing specifically for affirmative relief to the respondent through the entry of a decree setting the order aside if, upon a determination of the issues, the Court should hold, as we think it will be required to hold, that the order is void. Moreover, on April 11th the respondent filed an answer in this proceeding, in which, after raising various issues of fact and law, many of which were put in issue, without answer, by the Board's own petition filed pursuant to the statutory procedure, it asked relief as follows:

"Wherefore, the respondent prays that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with directions to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper."

Assimilating its motion to withdraw to the right of a plaintiff in an equity suit to a dismissal without prejudice, where no affirmative relief has been sought, the Board cites Ex parte Skinner v. Eddy Corp., 68 U. S. 93, and Jones v.

Securities & Exchange Commission, 298 U. S. 1, 19-20. [fol. 24-4] In Ex parte Skinner the Court specifically recognized (p. 94) that the plaintiff is not entitled to such a dismissal where affirmative relief is requested. See also Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138 (1898); Electric Accumulator Co. v. Brush Electric Company, 44 Fed. 602 (C. C., N. D., O., 1890); Hat-Swett Manufacturing Co. v. Waring Co., 46 Fed. 87 (C. C., S. D. N. Y., 1891); City of Detroit v. Detroit City Railway Co., 55 Fed. 569 (C. C., E. D., Mich., 1893).

Jones v. Securities & Exchange Commission, supra, involved the right of a person who had applied to the Commission for authority to sell securities to withdraw such application. In that case the applicant was seeking to do an act, i.e., sell securities, which he could not lawfully do without the consent of the Commission. The Commission was without any authority in the first instance to compel him to offer such securities for sale and acquired no authority so to do by the filing of his application. There was thus no affirmative action which it could take in the premises. The Court held that if the applicant chose to abandon the enterprise, on which he had sought to embark, by withdrawing his application to obtain the consent of the Commission to engage therein, he had a right to do so. Moreover, both the majority and dissenting opinions in that case recognized that the question turned upon presence or absence of authority in the Commission to take some affirmative action against him, although disagreeing as to whether it had the authority or not. The case is not in point and to the extent that it might be regarded as in point, stands only for the proposition that a party may dismiss a proceeding once begun if, under the issues presented, the other party, if successful, would be entitled only to a dismissal and not to affirmative relief.

The proceeding now pending before the Board is, as we have said, statutory. It is governed by the Act. The kind of a decree which the Court may enter is defined by the statute. The Court must either enter a decree enforcing, modifying and enforcing as modified or setting [fol. 24-5] aside the order in whole or in part. Whether the Court's jurisdiction be invoked by the Board in a petition to enforce or by the respondent in the proceedings before the Board by a petition to set aside, the decree is affirmative in form and effect. The statute thus provides

that in a proceeding such as this, the respondent, whether the Board or the employer, if successful, is entitled not merely to a decree of dismissal as in an ordinary equity suit where no affirmative relief is sought, but to an affirmative decree in its favor.

The proceeding being statutory, the rights of the parties are governed by the statute. The jurisdiction of the Court having been once invoked by either party, the other party is entitled to a determination of the issues and to the entry of a decree conforming in all respects to that which would be entered if it had been the moving party. Had the respondent invoked the jurisdiction of the Court by bringing a petition to set the Board's order aside, no one would contend that the proceeding could be withdrawn or discontinued on the motion of the Board. Under the plain wording of the statute, the Board, having invoked the jurisdiction of the Court by a petition to enforce, has put the respondent in the same position in which it would have been placed had it been the moving party, viz., in a position to assert as a matter of right that a decree setting the order aside be entered, if upon a determination of the issues the Court should be of the opinion that the order is invalid. This being so, the Board's petition may not be dismissed without the consent of the respondent, any more than a petition of the respondent to set the order aside could be dismissed without the consent of the Board.

It follows, we think, that the Board is not only not entitled as of right to have its motion to withdraw granted, but the Court is without power to grant it. This conclusion, we think, follows irrespective of whether, if this were an ordinary suit in equity, the petitioner would be [fol. 24-6] entitled to a withdrawal or discontinuance of its suit on its own motion or not.

If, however, it should be held, erroneously, as we believe, that the general rules governing the right of a plaintiff in an equity suit to a dismissal without prejudice, where no affirmative relief has been sought by the defendant, are applicable, the Board is not entitled to such a dismissal on the authorities cited in its own motion and others.

2. The motion, if addressed to the discretion of the Court, should be denied.

If despite the arguments hereinbefore advanced the Court is of the opinion that the motion is one addressed to its

discretion, it should be denied. On April 11th the respondent filed an answer to the Board's petition to enforce and moved for an order compelling a reply to certain affirmative allegations therein contained.

Among other things, the answer alleges (para. 12-16) that the conduct of the Trial Examiner was such as to constitute a denial to the respondent in the proceedings before the Board, as conducted by it through its Trial Examiner, of that full, fair and open hearing required by the Act and guaranteed by the due process clause in the Fifth Amendment to the Constitution of the United States. The answer also alleges in substance (para. 25-46) that the Board in its conduct of the proceedings before it failed to adhere to those "rudimentary requirements of fair play" essential to be observed by it. Morgan v. United States, 298 U. S. 468; Morgan v. United States, on second appeal, October Term, 1937, No. 581, U. S. Supreme Court, decided April 25, 1938. The answer also alleges (par. 11) that the order "and each and every part thereof is invalid" because the Board's purported findings "are, in material and controlling respects, not supported by evidence." The intended purpose and effect of paragraph [fol. 24-7] 1(e) of the order is to preclude Mr. Ford from stating his views in respect of unions, and of the advantages or disadvantages of joining the same by the employees of the respondent. It is the contention of the respondent that this paragraph of the order violates the guaranty of free speech contained in the First Amendment to the Constitution of the United States. This issue was automatically submitted by the Board for the determination of this Court by the filing of its petition to enforce with the transcript of the proceedings before it. It is specifically raised in the respondent's answer (par. 59). The answer raises other legal defects in the order, which, if existent, are incapable of being cured. Moreover, it is the contention of the respondent that the decision and order of the Board is invalid because based throughout upon a misconception of the rules of law to be applied and of its duties and powers under the Act. This again is an issue which the Board automatically and voluntarily submitted to the jurisdiction of this Court for determination when it filed its petition to enforce.

All of the issues raised by the proceeding now pending are of public importance. Consequently, their determina-

tion by this Court may not be avoided because one party to the suit desires to withdraw from the litigation and avoid their determination. Southern Pacific Company v. I. C. C., 219 U. S. 433, 452; Southern Pacific Terminal Company v. I. C. C., 219 U. S. 498.

On April 27th, upon the coming down of the second decision in the Morgan case, the respondent moved the Court for a commission to take depositions of the members of the Board and its staff on the issues thus raised by its answer. On May 2nd respondent served upon the Board its interrogatories addressed to the same issue, copies of which have been lodged in this Court. On May 2nd after such interrogatories had been served the Board filed its motion to withdraw, notice of which had been served upon the respondent's counsel on April 29th. The Board has [fol. 24-8] filed no reply to the affirmative allegations of the respondent's answer. In its motion it says (Paragraph 4):

"The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the Morgan case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire, argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable. In this manner questions concerning the validity of the Board's procedure will be obviated on the transcript of record, if one is later certified to the Court."

It is obvious that the primary purpose of the motion is to avoid examination of the members of the Board and its staff on the issue raised by the answer and to avoid answering the interrogatories propounded. Its secondary purpose is to patch up its record by going through the form of itself setting aside its order as a matter of grace, serving proposed findings to which the respondent may then have an opportunity to except and then entering its order over

again. It is not without significance that the procedure which the Board states it will follow if its motion should be granted does not include the reopening of the case for the taking of further testimony as requested by the respondent in a petition for rehearing filed by it after the issuance of the Board's order, denied by the Board the next day, and renewed in the respondent's petition for leave to adduce additional testimony now pending before this Court. The Board in its motion states that, if granted, the parties may [fol. 24-9] "if they so desire argue objections before the Board," but does not indicate any desire upon its part to hear such arguments. In its first opinion in the Morgan case, decided May 25, 1936, the Court said:

"The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The Board was thus warned more than eighteen months before it entered its decision and order in the present proceeding that it must, as said in the Court's second opinion in the Morgan case, accord to respondents in proceedings before it "the rudimentary requirements of fair play." Its motion is a virtual confession that it has not done so. Without confessing its failure so to do, it asks leave to withdraw its suit, pick the proceedings up at such point as it sees fit, go through the form of reconsidering a case already prejudged, and having thus patched up its record in this and perhaps other respects, come back to this Court with a new order asserting that it has now accorded to the respondent the rudimentary requirements of fair play. Assuming the motion to be addressed to the discretion of the Court—as we respectfully say it cannot be—the Board should not be permitted to withdraw or dismiss its petition for any such purpose.

II

The Motion to Withdraw the Certified Transcript of the Proceedings Before the Board Should Be Denied

Equally without precedent is the Board's motion to withdraw the certified copy of the transcript of record before [fol. 24-10] it, heretofore filed by it with the Court as required by Section 10(e) of the Act. This certified transcript is a part of the permanent records of this Court, being made so by the Act itself. Even assuming the right of the Board to withdraw its petition, the existence of this right would not carry with it the right to physically withdraw the transcript of record any more than it would carry with it the right physically to withdraw its petition to enforce. Moreover, the respondent would be seriously prejudiced by such withdrawal, even though the Board's motion to withdraw or dismiss its suit should be granted. An order of dismissal is a final judgment from which appeal or certiorari lies. Wilson v. Republic Iron & Steel Co., 257 U. S. 92 (1921); Seiber Lumber Co. v. Erkhart, 247 Fed. 284 (5 C. C. A., 1918); Iowa-Nebraska Light & Power Co. v. Daniels, 63 Fed. (2d) 332 (8 C. C. A., 1933); Massachusetts Fire & Marine Ins. Co. v. Schmick, 58 Fed. (2nd) 830 (8 C. C. A., 1932). By Section 10(e) of the Act the judgment of this Court in any proceeding instituted thereunder is reviewable by the Supreme Court of the United States on certiorari. Moreover, if the orders sought to be entered upon the Board's motion be regarded as interlocutory and not final, it may be reviewed by the Supreme Court on certiorari. Gay v. Ruff, 292 U. S. 25 (1934); United States v. Gulf Refining Company, 268 U. S. 542 (1925); Forsyth v. Hammond, 166 U. S. 506 (1896). The rules of the Supreme Court require that every petition for certiorari shall be accompanied by a certified copy of the record in the Court to which the writ is sought (Rule 38). By seeking to withdraw the certified copy of the record in the proceedings before the Board from the files of this Court, the Board would thus endeavor to prevent the respondent from seeking a review by certiorari of any order or decree entered by this Court permitting a withdrawal or dismissal of the Board's petition without prejudice.

[fol. 24-11] Since the Board in its motion—erroneously, as we believe—asserts that respondent is not entitled to

atmrmative relief in the proceeding now pending, respondent as a matter of precaution on May 4th filed in this Court a petition praying that the order of the Board be set aside, accompanied by a motion to consolidate the proceeding thus instituted, with that instituted by the Board. The Act expressly accords to the respondent [Section 10(f)] the right to institute such a suit, which when instituted, cannot be dismissed at the instance of the Board, and upon the institution of which it becomes the duty of the Court to determine the issues presented, and at the conclusion of the case, enter a decree in behalf of the petitioner, setting the order aside, or, if the issues should be determined in favor of the Board, a decree enforcing its order. The respondent is of right entitled to the determination of these issues by this Court in the petition filed by it, whatever disposition be made of the Board's motion. The Act further requires, however, that upon the filing of such a petition a transcript of the entire record before the Board be filed. This transcript must be certified by the Board. Such certified transcript is now on file in this Court. The respondent as petitioner in its own suit has asked that it be deemed filed in that case. This is an appropriate request. If not, and the motion of the Board to withdraw its own suit be granted, the same should be conditioned upon either (1) an order directing that the transcript now on file in this case be deemed forthwith to have been filed in the respondent's cross-suit, or (2) upon an order directing the Board to provide the respondent forthwith with a certified copy of the record before the Board and enjoining the Board from taking any further action until five days after said certified transcript has been furnished to respondent.

The Court should not by permitting a withdrawal of the Board's case and the transcript of the proceedings before it, deprive the petitioner of its statutory right to invoke [fol. 24-12] the jurisdiction of this Court for the purpose of determining the validity of the Board's order on all issues pertinent thereto.

It is respectfully submitted that the Board's motion should in all respects be denied.

Dated May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO WITHDRAW WITHOUT PREJUDICE

A motion having been filed herein by the National Labor Relations Board for leave to withdraw its petition for enforcement and the transcript of record filed herein on or about January 7, 1938, without prejudice;

Upon consideration thereof it is hereby

Ordered by this Court that the said motion of the National Labor Relations Board be and hereby is granted.

Approved for entry.

(Signed) Xen Hicks, Circuit Judge.

Entered May 5, 1938.

[fol. 26] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

OPPOSITION TO MOTION TO CONSOLIDATE CAUSES AND TO MOTION TO COMPEL CERTIFICATION OF TRANSCRIPT OF RECORD AND FOR A TEMPORARY INJUNCTION—Filed May 9, 1938

Comes now the National Labor Relations Board, petitioner in the first above-entitled cause and respondent in the second above-entitled cause, by its attorney, and in opposition to the motions of Ford Motor Company (hereinafter called the Company) for an order directing that the above-entitled causes be consolidated and that the transcript of record and other papers filed in the first above-entitled cause be deemed to be filed in the consolidated causes, and for an order directing that the transcript of record filed in the first above-entitled cause, or, in the

alternative, that the Board provide the Company with a certified transcript of the record and that the Board [fol. 27] be enjoined from taking any action whatsoever until 5 days thereafter, respectfully shows as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board filed in this Court its petition for enforcement of its order issued against the Company on December 2[illegible] 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," and also filed in this Court a certified transcript of the record of such proceeding before the Board.

2. On May 2, 1938, pursuant to notice, the Board filed in this Court a motion for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the transcript of record, for the purpose of vacating and setting aside its order and of having further proceedings before the Board.

3. On May 4, 1938, the Company filed in this Court a petition to review and set aside the said order of the Board issued December 22, 1937. No transcript of the record has been certified or filed in this Court upon the Company's said petition for review.

4. On May 5, 1938, the Court issued an order granting the said motion of the Board for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the certified transcript of record filed in the Court on January 7, 1938.

5. The Board having with leave of Court thus withdrawn its petition for enforcement and the transcript of the record, for the purpose of having further proceedings before the Board, the Board will issue, on May 10, 1938, [fol. 28] in the absence of unforeseen contingencies, an order vacating and setting aside its findings and order of December 22, 1937, and to that end on May 6, 1938, the Board caused to be served upon the attorneys for the Company a notice that on May 10, 1938, unless sufficient cause to the con-

trary shall then appear, the Board will vacate and set aside its said findings and order for the purpose of having further proceedings before the Board.

6. Upon the setting aside of the Board's findings and order of December 22, 1937, the above-entitled causes will be moot. Consequently, pending notification of the Board's action on May 10, 1938, the Court should not grant the Company's motions herein.

7. The Company's petition of May 4, 1938, for review of the Board's order of December 22, 1937, raises the identical issues raised by the Board's petition of January 7, 1938, for enforcement of its said order, and it is apparent that the Company filed its petition for review only for the purpose of endeavoring to prevent further proceedings before the Board. Since the Company's petition for review is redundant and not contemplated by the Act, and since the purpose of the said petition is no longer able to be accomplished, by reason of the Court's order of May 5, 1938, granting the Board's motion of May 2, 1938, the said petition for review should be dismissed and the Company's motions herein should be denied.

Wherefore, the Board, by its attorney, prays that the Company's motions herein be denied forthwith, or, in the alternative, that the Court take no action with respect to the said motions pending notification of the Board's action on May 10, 1938.

Dated this — day of May, 1938, at Washington, D. C.

—— ——,
General Counsel,
National Labor Relations Board.

[fol. 29] *Duly sworn to by Charles Fahy. Jurat omitted in printing.*

[fol. 30] EXHIBIT "A" TO OPPOSITION

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-199

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

To Frederick H. Wood, Esquire, Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company:

Notice

Please Take Notice that on Tuesday next, May 10, 1938, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, Case No. C-199, the National Labor Relations Board, unless sufficient cause to the contrary shall then appear, will vacate and set aside its findings and order in said case made December 22, 1937, for the purpose of further proceedings before the Board.

National Labor Relations Board, (Sgd.) by Nathan Witt, Secretary.

Receipt of the above notice acknowledged this 6th day of May, 1938.

(Sgd.) Frederick H. Wood, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

NATIONAL LABOR RELATIONS BOARD

vs.

FORD MOTOR COMPANY

Before Hicks, Simons and Allen, JJ.

It is now ordered by the court that the order heretofore entered in this cause on the 5th day of May, 1938 be

amended in-so-far as it permits the withdrawal of the certified transcript of record in this cause, and it is now ordered that the certified transcript of record be and remain in the files of this court.

Approved for entry.

(Signed) Xen Hicks, Circuit Judge.

Entered May 9, 1938.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

WITHDRAWAL OF PETITION—Filed June 2, 1938

Now comes the National Labor Relations Board and withdraws the petition for enforcement pursuant to an order of the court dated May 5, 1938.

National Labor Relations Board, by (Signed) Philip G. Phillips, Its Attorney.

[fol. 33] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

NOTICE OF MOTION—Filed June 4, 1938

Please Take Notice that the annexed motion to vacate an order made herein May 5, 1938, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building in the City of Covington, Kentucky, at nine o'clock, Eastern Standard Time, in the forenoon of that day, or as soon thereafter as it may be presented.

Dated June 2, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

Receipt of the above notice, together with a copy of the annexed motion and of the order granting motion to vacate order is hereby acknowledged this 2nd day of June, 1938.

Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

MOTION TO VACATE ORDER—Filed June 4, 1938

Now comes Ford Motor Company, respondent in the above-entitled cause, by its attorneys, and moves this Court to vacate an order made herein May 5, 1938, granting the motion of National Labor Relations Board for leave to withdraw without prejudice the petition for enforcement of order and certified transcript of record filed herein on or about January 8, 1938, and for such other and different relief as may be just and proper.

Dated June 2, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

[fol. 35] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

OPPOSITION TO MOTION TO VACATE ORDER—Filed June 6, 1938

Now comes the National Labor Relations Board, petitioner in the above-entitled cause, by its attorney, and in opposition to the motion of Ford Motor Company, respondent, to vacate the Court's order of May 5, 1938, granting

the Board's motion for leave to withdraw without prejudice the petition for enforcement and certified transcript of record filed herein on or about January 8, 1938, and for such other relief as may be just and proper, respectfully shows as follows:

1. As more fully appears in the Board's said motion for leave to withdraw, the Board had an absolute right to the withdrawal of its petition without prejudice. Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93 and authorities there cited; Jones v. Securities & Exchange Commission, 298 U. S. 1, 19-20.

2. Pursuant to the leave granted as of right by the Court on May 5, 1938, the Board on June 2, 1938, withdrew its petition, thus withdrawing the case and terminating the controversy.

3. The Court is without jurisdiction to grant the motion herein. There is no case in controversy and, in addition, no [fol. 36] certified transcript of the entire record is on file as required by Section 10(e) of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. II, § 160 (e)), since proceedings are pending before the Board and no final action has been had by the Board, as more fully appears in the Board's motion to vacate an order of the Court of May 9, 1938, in No. 8019. "Only upon the filing of a transcript exhibiting the Board's final action" do the Circuit Courts of Appeals have jurisdiction of petitions to enforce or review orders of the Board. In the Matter of the Petition of the National Labor Relations Board, decided by the Supreme Court, May 31, 1938.

4. The motion herein is unnecessary with respect to the certified transcript of record. By order of May 9, 1938, the Court modified its order of May 5, 1938, in regard to the withdrawal of the record. The record remains physically in the custody of the Court and is available for purposes of appeal if such should be sought by the Company.

Wherefore the Board, by its attorney, prays that the said motion be denied.

Robert Watts Acting General Counsel.

Dated, Washington, D. C., June 3, 1938.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

FORD MOTOR COMPANY, Respondent.

Before Hicks, Simons and Allen, JJ.

ORDER ON MOTION TO VACATE ORDER—Filed June 10, 1938

In this cause it is Ordered—

(1) That the application of the petitioner filed June 2, 1938, to be permitted to withdraw its petition for enforcement is not again passed upon because the matter is fully covered by the order of the court filed May 5, 1938, and the amendatory order filed May 9, 1938.

(2) That the motion of respondent filed June 4, 1938, to vacate the court's order on May 5, 1938, is denied; but the withdrawal of the petitioner's petition for enforcement is stayed for thirty days from this date, pending application to the Supreme Court for a writ of certiorari, Provided that within such period the applicant shall file with the Clerk of this court a certificate of the Clerk of the Supreme Court that its certiorari petition, record and brief have been filed, the stay shall continue un final disposition by the Supreme Court.

(3) The application of respondent to be heard in oral argument upon the motions and matters herein determined is denied.

Approved for entry.

Xen Hicks, Circuit Judge.

[fol. 38] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 18, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, respondent hereby indicates the following portions of the record to be incorporated into a transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari and requests that such transcript and the transcript of record designated by the praecipe filed simultaneously herewith in case No. 8019 be consolidated physically and certified together and that such consolidated transcript be delivered to the undersigned, counsel for respondent.

1. Petition for the enforcement of an order of the National Labor Relations Board, filed January 7, 1938.

2. Answer of respondent to petition for the enforcement of an order of the National Labor Relations Board, filed April 11, 1938.

[fol. 39] 3. Motion of petitioner for leave to withdraw petition for enforcement and transcript of record without prejudice, filed May 2, 1938.

4. Order, dated May 5, 1938, granting motion of petitioner for leave to withdraw petition for enforcement and transcript of record.

5. Order, dated May 9, 1938, amending said order dated May 5, 1938.

6. Motion of respondent to vacate said order of May 5, 1938, filed June 4, 1938.

7. Petitioner's withdrawal of petition, filed June 2, 1938.

8. Order, dated June 10, 1938, refusing to pass upon withdrawal of petition filed June 2, 1938, denying motion to vacate order of May 5, 1938, providing for a stay, and denying application for oral argument.

9. This praecipe of respondent for transcript of record.

Dated, June 17, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Respondent.

Receipt of a copy of the above praecipe superseding a similar praecipe of even date hereby acknowledged this 17th day of June, 1938.

Robert B. Watts, Acting General Counsel, N. L. R. B.

[fol. 40] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, petitioner hereby indicates the following additional portions of the record to be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari.

1. Respondent's memorandum in opposition to motion of National Labor Relations Board for leave to withdraw without prejudice petition for enforcement and transcript of record, filed on or about May 4, 1938.

2. Motion of respondent to consolidate causes, filed May 4, 1938.

3. Opposition of petitioner to motion to consolidate causes, filed May 9, 1938.

4. Opposition of petitioner to motion to vacate order, filed June 5, 1938.

5. This praecipe of petitioner for additional portions for transcript of record.

Dated, June 22, 1938.

Robert B. Watts, Acting General Counsel National Labor Relations Board.

Receipt of a copy of the above praecipe hereby acknowledged this 22d day of June, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 41] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Respondent hereby requests that the following additional portions of the record be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari:

1. Certificate of the National Labor Relations Board, filed January 7, 1938, omitting the documents annexed thereto.

2. Supplemental certificate of the National Labor Relations Board, filed January 10, 1938, omitting the document annexed thereto.

3. This supplemental praecipe.

Dated, June 23, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Respondent.

Receipt of a copy of the above praecipe on this 23rd day of June, 1938, is hereby acknowledged.

Robert B. Watts, Acting General Counsel, National Labor Relations Board, Petitioner.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, OCTOBER TERM, 1937

No. 8019

FORD MOTOR COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A REVIEW OF AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed May 4, 1938

Comes now Ford Motor Company, the petitioner above named, and, pursuant to the provisions of an Act of Congress approved July 5, 1935 (49 Stat. 449, 29 U. S. C. §§ 151-166), known as the National Labor Relations Act (hereinafter called the Act), respectfully petitions this Honorable Court for a review of and to set aside a purported order purported to have been issued on December 22, 1937, by the National Labor Relations Board (hereinafter called the Board) in a proceeding instituted by the Board against petitioner. Said proceeding is known upon the records of the Board as Case No. C-199, the title thereof being "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America."

In support of this petition, petitioner respectfully shows:

1. Petitioner is, and at all times herein mentioned was, a corporation organized under and existing by virtue of the laws of the State of Delaware, and has and maintains an [fol. 44] office and place of business and transacts business in the City of Dearborn, State of Michigan.

2. By reason of the matters shown in paragraph 1 hereof, this Honorable Court has jurisdiction of this petition by virtue of the provisions of Section 10(f) of the Act.

3. On June 26, 1937, the Board issued and served upon petitioner a complaint in said Case No. C-199, charging that petitioner had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the Act, and issued and served upon petitioner a notice of hearing. On July 3, 1937, petitioner duly filed with the Board its answer to said complaint.

4. Thereafter, from July 6 to July 30, 1937, the Board, by a Trial Examiner, held a purported hearing in said proceeding. At said hearing, the Board by its Examiner received testimony and other evidence. During said hearing amendments to the complaint were made and answers were filed thereto.

5. Thereafter, on August 3, 1937, the Board ordered that said proceeding be transferred to and continued before it.

6. Thereafter, on December 22, 1937, the Board purported to make and enter an order in said Case No. C-199, said purported order being as follows:

"Order

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Ford Motor Company, its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) Discouraging membership in International Union, United Automobile Workers of America or any other labor [fol. 45] organization of its employees by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their membership in, activity in behalf of, or sympathy toward any such labor organization;

"(b) Dominating or interfering with the formation or administration of Ford Brotherhood of America, Inc., or any other labor organization of its employees, or con-

tributing financial or other support to any such labor organizations;

"(c) Organizing, maintaining, supporting or assisting vigilante or similar groups, or employing or using such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America or any other labor organization of its employees;

"(d) Threatening, assaulting, beating, or in any other manner interfering with, restraining, or intimidating, directly or indirectly, members of International Union, United Automobile Workers of America or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant;

"(e) Circulating, distributing or otherwise disseminating among its employees statements or propaganda disparaging or criticizing labor organizations or advising its employees not to join such organizations;

"(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to George Onnela, Richard Weyhing, Clarence Fleming, Elmer Mackie, Thaddeus Radke, Alfred Onnela, Ray Onnela, Martin Jensen, Clifford Sheldon, John J. Dovey, Anthony J. Schipper, Fred Nygard, George B. Zubick, Joseph Gutierrez, John Barron, Joseph Sable, Alphonse Kuzulis, Homer King, Percy Llewellyn, Joseph Nierotko, George Smick, Joseph Galusky, Hector F. Manseau, Birtus C. Hall, Emil Tomkow, Joseph Bailey, John Cwikiel, Fred Gullickson, and Jacob Winsiewski immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

"(b) Make whole the persons named in paragraph 2(a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less any amount each has earned during that period;

[fol. 46] "(c) Post immediately in conspicuous places throughout all departments of its plants in Dearborn and Highland Park, Michigan, notices to its employees stating that the respondent will cease and desist in the manner aforesaid;

"(d) Maintain such notices for a period of at least sixty (60) consecutive days from the date of posting;

"(e) Notify the Regional Director for the Seventh Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

"And it is further ordered that the allegations of the complaint be, and they hereby are, dismissed with respect to Raymond Jewell, George Sazynski, Guiseppe Gregorio, Gabriel Bobaila, Leo J. Krugh, and Daniel Devor."

7. Upon information and belief, the purported order set forth in paragraph 6 hereof was not the order of the Board, and at the time of its purported entry the Board did not consider, and had not considered, the subject matter thereof, and had not reached any opinion in respect of the issues presented in the proceeding before it, and did not duly make and enter said order in the manner required by the Act.

8. Thereafter, on December 23, 1937, there was delivered to respondent's attorney of record in the proceeding before the Board an unsigned, unauthenticated and uncertified mimeographed document entitled in said proceeding and headed "Decision and Order" and on the same date there was delivered to respondent at its principal office at Dearborn, Michigan, a document of the same description. Said document contained a so-called "Statement of the Case," so-called "Findings of Fact," so-called "Conclusions of Law" and a so-called "Order." The so-called "Order"

contained in said document was the same as the purported order referred to and set forth in paragraph 6 hereof.

9. Thereafter, on January 3, 1938, petitioner filed with the Board its petition to vacate and set aside said purported order and for rehearing, which petition the Board denied on January 4, 1938. A true copy of said petition is annexed hereto as Exhibit A and is hereby made a part hereof.

[fol. 47] 10. Said purported order and each and every part thereof is invalid and void because unaccompanied and unsupported by any findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

11. Said purported order and each and every part thereof is invalid and void because the purported findings of fact, if any, upon which it is based are not findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

12. Said purported order and each and every part thereof is invalid and void because the purported findings of fact upon which it is based are, in material and controlling respects, not supported by evidence, within the meaning of the provisions of Section 10 of the Act, and are contrary to the evidence, and also because said purported findings of fact are inadequate, incomplete and insufficient in that material facts which are conclusively established by the evidence have been disregarded and ignored by the Board, and also because said purported findings of fact disregard and ignore matters of current history material to the issues which are common knowledge and which the Board in the exercise of its quasi-judicial powers ought to have taken into consideration.

13. The Trial Examiner by whom the Board held its hearing interrogated many of the witnesses, not in a fair, dispassionate and impartial manner for the purpose of eliciting the truth, but in such manner as to cause them to believe that he desired them to give testimony unfavorable to petitioner and to withhold testimony favorable to petitioner, [fol. 48] and in such manner as to cause them to believe that they could with impunity give partial, misleading and false testimony, provided the effect produced thereby was unfavorable to petitioner.

14. Said Examiner overruled proper objections of counsel for petitioner to questions which counsel for the Board asked witnesses, and sustained improper objections of counsel for the Board to questions which counsel for petitioner asked witnesses.

15. Said Examiner completely ignored not only the rules of evidence generally prevailing in courts of law and equity but also the fundamental principles of the law of evidence and the basic principles of justice, and accepted evidence having no probative value and worthy of no credence, and which would not be relied on by responsible persons in their own serious affairs, and which did not meet the test laid down by the Board itself (NLRB 1st An. Rep. 23) as being the kind of evidence that would affect fair-minded men in the conduct of their daily and more important business.

16. Said Examiner conducted himself at said hearing as an advocate opposed to petitioner, with a view to causing the record of said hearing to be adverse to petitioner, and thereby and in other respects failed to perform his duties as agent of a judicial or quasi-judicial body.

17. By reason of the matters alleged in the foregoing paragraphs 13 to 16, inclusive, said purported order and each and every part thereof is invalid and void because petitioner was denied the full and fair hearing required by the Act and guaranteed by the Fifth Amendment of the Constitution of the United States.

18. From August 3, 1937, when the proceedings before the Board were transferred to it, as alleged in the foregoing [fol. 49] paragraph 5, until December 23, 1937, when the purported order of the Board was purported to have been served upon petitioner, the Board communicated in no way with petitioner with respect to said proceeding, and the Board at no time afforded to petitioner any opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or to any proposed order.

19. By its acts and omissions as alleged in paragraph 18 hereof, the Board, without notice to petitioner, departed from the normal procedure contemplated by the Rules and Regulations of the Board, and failed to accord petitioner a full and fair hearing as required by the Act and the due process clause of the Fifth Amendment.

20. Neither the Board nor any member thereof was personally present at the taking of testimony or saw or heard any of the witnesses at said hearing testify.

21. Upon information and belief, neither the Board nor any member thereof read the testimony of the witnesses who testified before the Trial Examiner or read or inspected the exhibits received in evidence.

22. Upon information and belief, neither the Board nor any member thereof judicially weighed or appraised the evidence received at said hearing.

23. Upon information and belief the purported decision and order of the Board in substantially the form in which it was purported to have been served upon the petitioner was prepared by subordinates of the Board and not by the Board or any member thereof.

24. Upon information and belief, between August 3, 1937, and December 23, 1937, it was the practice of the Board in [fol. 50] proceedings transferred to it to submit the records therein to a so-called Review Section, composed of subordinates of the Board, for the purpose of analyzing such records and for the preparation of proposed findings of fact.

25. Upon information and belief, between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section for the preparation of proposed findings of fact, which were thereafter prepared by said Review Section and submitted to the Board, without notice to petitioner, and without affording to petitioner any opportunity to object or except thereto.

26. Upon information and belief, from the period between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to said Review Section for the preparation of proposed conclusions of fact and law, and proposed terms of an order, as well as for the preparation of proposed findings of fact.

27. Upon information and belief, that between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section, which thereafter prepared proposed conclusions of fact and law and proposed terms of an order, and submitted the same

to the Board, without notice to petitioner, and without affording to petitioner any opportunity to object or except thereto.

28. The record in the proceeding before the Board, submitted to said Review Section as aforesaid, was not submitted pursuant to any order made by the Board and served upon or communicated to the petitioner, and the Board at no time made known to petitioner the identity of the persons to whom said record was so submitted.

[fol. 51] 29. Upon information and belief, after transfer of the proceedings to the Board, certain subordinates of the Board prepared proposed findings of fact, conclusions of fact and law, and proposed terms of an order, and submitted the same to the Board, without notice by the Board to petitioner and without affording to petitioner any opportunity to object or except thereto.

30. By each of its acts and omissions as alleged in the foregoing paragraphs 25, 27, 28 and 29, and by all of said acts and omissions taken together, the Board departed from its own rules of procedure, by which it is provided that, where an intermediate report is prepared for submission to the Board, the same shall be served upon the respondent in the proceeding and opportunity afford to except thereto.

31. Upon information and belief, neither the Board nor any member thereof read any fair condensation or analysis of the evidence received at the hearing before the Trial Examiner.

32. Upon information and belief, the Board, in making its findings of fact, conclusions and purported order, relied either solely or in part upon the proposed findings, conclusions and order prepared by its subordinates and submitted to the Board as stated in the foregoing paragraphs 25, 27, 28 and 29.

33. Petitioner was never accorded by the Board and did not receive any opportunity to inspect said proposed findings, conclusions and order or to object or except thereto or to point out any errors or improper statements or improper inferences or improper conclusions or improper terms of order therein, or to urge that said proposed [fol. 52] findings were not in accordance with the evidence.

34. Upon information and belief, the Trial Examiner, who saw and heard the witnesses testify at the hearing, did not prepare or submit to the Board any intermediate report, or any proposed findings of fact or any recommendations as to findings of fact, and did not inform the Board as to his opinion or belief as to the credibility of the several witnesses who testified at the hearing.

35. Upon information and belief, the Board received from its subordinates, including its attorney who conducted the hearing on its behalf before the Trial Examiner, reports, memoranda and other communications containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; the Board in making its order relied in part upon said reports, memoranda and communications, without personally checking or weighing or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without affording petitioner any opportunity to test, refute or explain said inferences, conclusions or matters extrinsic to the record.

36. Upon information and belief, the Board in making its purported order was not, as it ought to have been, guided solely by the evidence, but in reaching its conclusions was improperly influenced by extraneous considerations, political and otherwise, and the Board, in making and entering its purported decision and order, consulted with persons other than members of the Board or its employees with respect thereto.

37. Upon information and belief, the findings contained in the purported decision and order of the Board were not its findings, and were not made as a result of judicial consideration or weighing or appraisal of the evidence by it, but were the findings of its subordinates, who under the [fol. 53] Act had no authority to make any findings.

38. Petitioner was without knowledge of the matters alleged in the foregoing paragraphs 21 to 36, inclusive, hereof until after December 23, 1937, and is without knowledge as to the identity of the subordinates of the Board referred to in said paragraphs.

39. By reason of the matters alleged in the foregoing paragraphs 18 to 38, inclusive, said purported order and

each and every part thereof is invalid and void because petitioner was denied a full and fair hearing as required by the National Labor Relations Act and guaranteed by the Fifth Amendment to the Constitution of the United States.

40. By reason of the matters alleged in the foregoing paragraphs 22 to 38, inclusive, said purported order and each and every paragraph thereof is invalid and void because the Board unlawfully delegated to its subordinates powers conferred upon it by said Act, or the exercise of a substantial part thereof.

41. The Board in its purported findings of fact referred to and relied upon evidence of a patently incompetent, unreliable and prejudicial character.

42. In the making of its purported findings and order, the Board failed to consider facts and circumstances required to be considered, and its purported findings do not embrace basic facts required to support the order.

43. The Board included in its purported findings of fact statements which are supported by no evidence whatever and statements which misrepresent the evidence in material respects.

44. The Board phrased its purported findings of fact in [fol. 54] language, and included in its purported findings sentences and paragraphs, not appropriate to a statement of findings of fact but calculated to and having the effect of castigating petitioner before its employees and the public generally and of supplying material for reproduction in the press.

45. The Board relied in its purported findings of fact upon evidence which the Examiner had excluded by rulings which the Board in its order affirmed.

46. The Board made its purported order and the purported findings of fact upon which its order is based without first having accorded to petitioner the substance of a full and fair hearing, the hearing in this proceeding being inadequate in the respects set forth in the foregoing paragraphs 13 to 40, inclusive.

47. By reason of the matters alleged in the foregoing paragraphs 41 to 46, inclusive, and other matters, said purported order is invalid and void because the Board, in

making said purported order and the purported findings of fact upon which said order is based, did not act in a judicial or quasi-judicial manner as is required by Section 10 of the Act and by the due process clause of the Fifth Amendment to the Constitution.

48. Upon information and belief the purported decision and order of the Board was not its order but was the order of its subordinates, and the purported conclusions of the Board were not the conclusions of the Board made as a result of its judicial consideration or weighing and appraising of the evidence but were the conclusions of its subordinates who, under the Act, had no authority to make [fol. 55] said order or conclusions.

49. The Board arbitrarily refused to set aside its purported order and grant to petitioner a rehearing for the purposes set forth in the above-mentioned petition filed with the Board on January 3, 1938, and thereby abused its discretion.

50. Said purported Order, and each and every part thereof, is invalid and void because none of the acts found by the Board to have been done by petitioner occurred in commerce, or burdened or obstructed commerce or the free flow of commerce, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act when construed in the light of constitutional limitations upon the powers of Congress, including the Tenth Amendment to the Constitution, and because the Act, if construed to apply to the acts found by the Board to have been done by petitioner, is, as so construed, unconstitutional and void in that it attempts to regulate matters not within the powers conferred upon Congress by the Constitution and violates the Tenth Amendment thereto, and because the acts found by the Board to have been done by petitioner are, individually and collectively, so minor in character, scope and duration that their possible effect upon interstate commerce is only indirect, remote, incidental and collateral.

51. The National Labor Relations Act, in so far as it provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", and in conferring judicial power upon a Board which is both prosecutor and judge, violates Article III of the Constitution

[fol. 56] of the United States, in that it purports to grant judicial power to a non-judicial tribunal whose members hold office for limited terms, for terms not solely dependent on good behavior, and are removable otherwise than by impeachment, and which tribunal is neither the Supreme Court nor an inferior court ordained and established by the Congress.

52. The provision contained in Section 10(e) of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", if so interpreted as to require the Court to enter a decree enforcing provisions of the order without its weighing the evidence or giving any consideration thereto other than for the purpose of seeing whether there is some evidence to support the order and the purported findings of fact upon which based, without consideration of any other facts or circumstances of equitable cognizance, and without considering for itself whether the conduct of the petitioner is sufficient to warrant the entry of a decree of enforcement having the effect of an injunction issuing out of a court of equity, and without the exercise of any judicial discretion whatever, is repugnant to Article III of the Constitution of the United States whereby the judicial power of the United States is expressly and exclusively conferred upon the Supreme Court of the United States and such inferior courts as Congress may from time to time establish, and to the provisions of Article V of the Amendments to the Constitution of the United States, whereby it is provided that no person shall be deprived of life, liberty or property without due process of law.

[fol. 57] 53. Section 10(b) of the Act provides that a proceeding before the Board relating to alleged unfair labor practices as defined in said Act may be instituted only by the issuance by the Board of a complaint and service thereof upon the person complained of. The powers thus sought to be conferred upon the Board by Section 10(b) of the Act are not judicial in nature, but are of the nature of the duties of a public prosecutor. Section 10(c) of the Act provides that if, after hearing before the Board, the Board shall be of the opinion that any person named in such complaint has engaged in or is engaging in any unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such

person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. Sections 10(e) and (f) of the Act provide that in any proceeding in court to enforce or set aside an order of the Board the findings of the Board as to the facts, if supported by evidence, shall be conclusive. The powers thus sought to be conferred upon the Board by Sections 10(c), (e) and (f) of the Act are judicial in nature. The Act thus seeks to confer upon the Board the functions of both prosecutor and judge in the same proceeding, such proceeding being essentially judicial in nature, and thereby violates Articles I, II and III of the Constitution of the United States, which provide for the separation of legislative, executive and judicial powers, and thereby also violates the Fifth Amendment of the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law.

[fol. 58] 54. Paragraph 1 of the purported order herein exceeds in scope any order which the Board may lawfully make under the National Labor Relations Act on the record and findings in the proceedings before it.

55. Paragraph 1(a) of said purported order is invalid and void because the purported findings of the Board that petitioner discharged 29 of the more than 80,000 persons employed at its River Rouge plant under circumstances constituting an unfair labor practice is insufficient to support any order directing petitioner to cease and desist from discharging any of its employees in the future.

56. Paragraph 1(d) of said purported order is invalid and void because there is no finding of fact and no evidence to support any finding of fact that the persons found by the Board to have been threatened, assaulted or beaten were employees of petitioner.

57. Paragraph 1(d) of said purported order, in so far as it orders petitioner to cease and desist from in any manner interfering with, restraining or coercing any person other than employees of respondent, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

58. Paragraph 1(d) of said purported order is invalid and void in that said paragraph purports to deprive petitioner of its lawful right to take appropriate action to eject trespassers from its property and to prevent its employees from engaging in acts on or in the vicinity of its property which would be calculated or would tend to interfere with the ingress and egress of persons to and from petitioner's [fol. 59] plant and to cause breaches of the peace among employees of petitioner.

59. Paragraph 1(d) of said purported order is invalid and void because the Act is inapplicable to acts of physical violence.

60. Paragraph 1(e) of said purported order is invalid and void because not authorized by any provision of the Act when construed in the light of the requirements of the First Amendment to the Constitution and because, if the Act be construed to authorize said Paragraph 1(e), the Act is to that extent unconstitutional and void as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

61. Paragraph 1(f) of said purported order is invalid and void because, being a restatement of the provisions of Section 7 and Section 8(1) of the Act, it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact.

62. Paragraphs 2(a) and 2(b) of said purported order are invalid and void because they are not supported by any finding of the Board that the persons named in said paragraphs have been reasonably diligent in seeking employment elsewhere or that said persons have not had and rejected opportunities to obtain substantially equivalent employment elsewhere or that said persons have ever requested petitioner to reinstate them.

63. Paragraph 2(b) of said purported order is invalid and void because it fails to provide that the payments to be made by petitioner to each of the persons named in paragraph 2(a) of said order shall equal the amount which each [fol. 60] such person would have earned as wages during the period from the date of his discharge to the date of the offer of reinstatement, less any amount which, with the exer-

cise of reasonable diligence, he would have earned during that period and any amount received by him from any source by reason of his unemployment, and thereby fails to effectuate the policies of the Act, and because it fails to provide any method or procedure for the determination of the amount to be paid by petitioner to the persons referred to therein.

64. Paragraphs 1(a), 1(b), 1(c) and 1(d) of said purported order, in so far as they order petitioner to cease and desist from engaging in certain practices with respect to any labor organization or the members of any labor organization other than the particular labor organization named in each of said respective paragraphs, are invalid and void because they are unsupported by the purported findings of fact and exceed the issues raised in the proceeding.

65. Paragraph 2(c) of said purported order is invalid and void because there is no evidentiary finding by the Board, and no evidence to support any evidentiary finding, that the action ordered therein to be taken will effectuate the policies of the Act, and because such action will not effectuate the policies of the Act, and because said paragraph fails to set forth in words and figures the notice required to be posted by petitioner, and because the Act, when construed in the light of the requirements of the Fifth Amendment to the Constitution, does not authorize the Board to order petitioner to state that it has heretofore engaged in any unfair labor practice.

[fol. 61] 66. Said purported order and each and every part thereof, in so far as directed to officers and agents of petitioner, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

67. Paragraph 1 of said purported order, in so far as it orders respondent to cease and desist from any acts directed toward any of its employees other than its employees at its plants in Dearborn and Highland Park, Michigan, is invalid and void because it is unsupported by the purported findings of fact and goes beyond the issues raised in the proceedings.

Wherefore, petitioner prays this Honorable Court that it cause notice of the filing of this petition to be served upon

the Board and that this Court take jurisdiction of the proceeding and the questions determined therein and make and enter a decree setting aside said purported order and each and every part thereof, and petitioner prays for such other and further relief as may be just and proper.

Dated, May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

[fols. 62-75] Exhibit "A" to petition omitted. See Exhibit "A," printed side page 12-16, ante.

[fols. 76-81] Notice and motion to consolidate causes omitted. Printed side page 18, ante.

[fol. 82] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO COMPEL THE NATIONAL LABOR RELATIONS BOARD TO CERTIFY TRANSCRIPT OF RECORD AND FOR TEMPORARY RELIEF—Filed May 5, 1938

To Charles Fahy, Counsel for National Labor Relations Board, Shoreham Building, Washington, D. C.:

Please Take Notice that on the 9th day of May, 1938, at 9:00 A.M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion to compel the National Labor Relations Board to certify transcript of record and for temporary relief will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated, May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

Due service acknowledged this — day of May, 1938.

——— ———, Attorney for National Labor Relations Board.

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO COMPEL THE NATIONAL LABOR RELATIONS BOARD TO FURNISH A CERTIFIED TRANSCRIPT OF RECORD AND FOR A TEMPORARY INJUNCTION—Filed May 5, 1938

Comes now Ford Motor Company, the petitioner above named, and respectfully shows this Honorable Court as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board (hereinafter called the Board) filed with this Court in a cause entitled "National Labor Relations Board, Petitioner, v. Ford Motor Company, Respondent, No. 7919" its petition for the enforcement of a purported order of the Board purported to have been issued on December 22, 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America", and also filed with this Court a certified transcript of the record of such proceeding before the Board.

2. On April 29, 1938, the Board served upon counsel for petitioner, and on May 2, 1938, filed with this Court, a motion [fol. 84] for leave to withdraw without prejudice its petition for enforcement of its purported order and the certified transcript of record filed with this Court.

3. On May 4, 1938, petitioner filed herein under the provisions of Section 10(f) of the National Labor Relations Act a petition for a review of and to set aside the purported order of the Board referred to in paragraph 1 above.

4. Petitioner believes it would be futile for it to request the Board to certify a transcript of record to be filed herein in view of the statements contained in the Board's motion

to withdraw referred to in paragraph 2 above and in public statements reported in the press as coming from the Board and its General Counsel to the effect that the Board proposes, if its motion to withdraw be granted, to reopen the proceeding against the petitioner for the purpose of correcting a few of the many errors which petitioner alleges and believes render null and void the Board's purported order and the entire proceeding and in view of the fact that the certification of such record would, by continuing jurisdiction of the proceeding in this Court, prevent the Board from following its announced proposed procedure.

5. The petitioner believes and alleges that, unless the relief hereinafter prayed for is granted, it will suffer irreparable damage in that the Board will thus be permitted to avoid a judicial determination of the validity not only of the Board's order but also of the entire proceeding before the Board and to indefinitely defer the date on which such judicial determination can be had while at the same time keeping alive a proceeding which the petitioner contends [fol. 85] is so ridden with prejudicial errors that no valid order can ever be entered by the Board therein.

Wherefore, petitioner prays this Honorable Court for an order directing: either (1) that the certified transcript of record now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed herein; or (2) that the Board provide petitioner forthwith with a certified transcript of the entire record in the proceeding before the Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199; and that the Board, its attorneys, agents and representatives, and each of them, be restrained and enjoined from taking any action of any nature whatsoever, until five days after said certified transcript has been furnished to petitioner, in or with respect to the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199; and for such other and further relief as may be just and proper.

Dated May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

[fol. 86] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fols. 87-90] Opposition to Motion to Consolidate Causes and to Motion to Compel Certification of Transcript of Record and for a Temporary Injunction omitted. Printed side page 26, ante.

[fol. 91] Exhibit "A" to opposition omitted. See exhibit "A", printed side page 30, ante.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

ORDER AS TO RECORD BEFORE BOARD—Filed May 9, 1938

Application having been duly made by Ford Motor Company, petitioner herein, for an order directing that the certified transcript of the entire record in the proceeding before the National Labor Relations Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199 now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed herein, and counsel for the respective parties having been heard, and after due deliberation thereon, it is hereby

Ordered that the certified transcript of the entire record in the proceeding before the National Labor Relations Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199 now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed in this cause, No. 8019, as of the [fol. 93] time of the filing in this Court by petitioner of its petition to review and set aside the order of the Board purportedly made against it on or about December 22, 1937.

Dated May —, 1938.

(Signed) Xen Hicks, Circuit Judge. —— ——, Circuit Judge. —— ——, Circuit Judge.

[fol. 94] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019.

[Title omitted]

NOTICE OF MOTION—Filed May 19, 1938

Please Take Notice that the annexed motion for leave to amend the petition of Ford Motor Company, filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board, and the proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building in the City of Covington, Kentucky, on the 23rd day of May, 1938, at 9 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as it may be presented.

Dated, May 18, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

Receipt of the above notice together with a copy of the annexed motion on the 18th day of May, 1938, is hereby ac-
[fol. 95] knowledged.

Charles Fahy, Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR A REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed May 19, 1938

Now Comes Ford Motor Company, petitioner in the above-entitled cause, by its attorneys, and moves this Court for leave to amend its petition filed herein May 4, 1938, for a

review of and to set aside an order of the National Labor Relations Board by substituting for paragraph 35 thereof the following paragraphs:

35. Upon information and belief, the Board received from its subordinates, including its attorneys who conducted the hearing on its behalf before the Trial Examiner, and from other persons connected with the prosecution of the complaint before the Board, reports, memoranda and other communications, oral and written, containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; and in making its purported order the Board considered and relied upon said reports, memoranda and communications, without personally weighing, [fol. 97] checking or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without exhibiting the same to petitioner or affording petitioner any opportunity to test, refute or explain said inferences or conclusions or said matters extrinsic to the record.

35-a. Upon information and belief, the said subordinates of the Board, who prepared proposed findings of fact, conclusions of fact and law, and proposed terms of an order, and submitted the same to the Board, received from other employees of the Board, including its attorneys who conducted the hearing on its behalf before the Trial Examiner and from other persons connected with the prosecution of the complaint before the Board, reports, memoranda and other communications, oral and written, containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; and considered and relied upon the same, without affording to the petitioner any opportunity to test, refute or explain said inferences or conclusions or matters extrinsic to the record.

35-b. Upon information and belief, during the progress of the hearings before the Trial Examiner, who was purportedly acting as a judicial representative of the Board, he consulted upon the merits of the case out of the presence of the petitioner with the attorneys prosecuting the case for the Board and for the Union.

35-c. By reason of the facts alleged in paragraphs 35 and 35-a and 35-b hereof, and by reason of the actions of the [fol. 98] Trial Examiner set forth in paragraphs 13 through 16 hereof, and by reason of the manner in which the charge against petitioner was investigated, and by reason of the manner in which the complaint against petitioner was heard before the Trial Examiner, and by reason of the manner in which the proceedings were conducted before the Board and in which the case was considered and determined by it, the ability of the Board to function with impartiality in its judicial or quasi-judicial capacity was materially prejudiced by the activities of its investigating and prosecuting arms, and the investigating, prosecuting and judicial functions of the Board were so commingled as to render wholly invalid its purported order and any other order which the Board might seek to make upon the proceedings had herein, and petitioner was thereby deprived of a full, fair and open hearing and of due process of law and of the protection guaranteed it by Article III of the Constitution of the United States.

Dated, May 18, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

[fol. 99] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

OPPOSITION TO MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW—Filed May 23, 1938

Now comes National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and in opposition to the motion of Ford Motor Company, petitioner, for leave to amend its petition filed herein May 4, 1938, for a review of and to set aside an order of the Board issued

December 22, 1937, respectfully shows as follows:

1. It appears from the face of said motion that the facts alleged upon information and belief in paragraphs 35 and 35-a, and the conclusions alleged in paragraph 35-c of said motion relate to the Board's method of decision and to the mental processes of the Board. For reasons and upon authorities more fully to be urged by the Board in an opposition to the Company's petition for a commission to take depositions, which opposition is incorporated herein by reference and will be filed in the Court on or before May 31, 1938, pursuant to leave granted by Judge Hicks on May 20, 1938, said matters are not material to the issues of the case and inquiry by courts may not be had into such matters, and, in the circumstances of this case, petitioner is estopped [fol. 100] to raise said matters as objections to the validity of the Board's order.

2. It appears from the face of said motion that the facts alleged upon information and belief in paragraphs 35, 35-a, and 35-b, and the conclusions alleged in paragraph 35-c of said motion, especially those alleged in said paragraphs 35-b and 35-c, relate to matters which were not urged as objections before the Board. Consequently, according to the terms of Section 10 of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 et. seq.) and for reasons more fully to be given in the Board's said opposition to be filed herein, said matters may not be urged before the court as objections to the validity of the Board's order.

Wherefore the Board, by its attorney, prays that said motion be denied forthwith, or, in the alternative, that the court take no action with respect to said motion until after said opposition of the Board has been filed and considered by the Court, and that said motion then be denied.

Dated at Washington, D. C., this 21st day of May, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO VACATE ORDER

To: Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company:

Please Take Notice that on the 6th day of June 1938, at 9 a. m. (E.S.T.), or as soon thereafter as counsel can be heard, the annexed motion to vacate order will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

Dated June 1, 1938.

Receipt of above notice acknowledged this 1st day of June 1938.

(Signed) Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath de Gersdorf, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 102] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO VACATE ORDER—filed June 2, 1938

Comes now the National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and shows as follows:

1. On January 7, 1938, pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§

151-166), the Board filed in this Court in Cause No. 7919, entitled "National Labor Relations Board v. Ford Motor Company," its petition for enforcement of its order issued against the Ford Motor Company on December 22, 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," and also filed in this Court a certified transcript of the record of such proceeding before the Board.

2. On May 2, 1938, pursuant to notice, the Board filed in this Court a motion for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the transcript of record, for the purpose of vacating and setting aside its order, pursuant to Section 10 (d) of the Act, and of having further proceedings before the Board. A copy of said notice and motion is hereto annexed, marked Exhibit A, and made a part hereof. The memorandum of Ford Motor Company in opposition to said motion is on file in this Court in Cause No. 7919 and is hereby referred to and made a part hereof.

[fol. 103] 3. On May 4, 1938, the Company filed in this Court a petition to review and set aside the said order of the Board issued December 22, 1937.

4. On May 5, 1938, the Court issued an order granting the said motion of the Board for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the certified transcript of record filed in the Court on January 7, 1938. A copy of said order is hereto annexed, marked Exhibit B, and made a part hereof.

5. On the following day, May 6, 1938, pursuant to Section 10 (d) of the Act, the Board served notice upon the Company that on May 10, 1938, unless sufficient cause to the contrary then appeared, the Board would vacate and set aside its order for the purpose of further proceedings before the Board. A copy of said notice is hereto annexed, marked Exhibit C, and made a part hereof.

6. On May 9, 1938, while said notice of the Board was outstanding in the case before the Board, and while further proceedings before the Board had thus been initiated and were not completed, upon a motion by the Company which was opposed by the Board, the Court issued an order that

the certified transcript of the record filed in the Court on January 7, 1938, upon the Board's petition for enforcement in Case No. 7919 be deemed to be filed in the case herein as of the date of the Company's petition for review (May 4, 1938), notwithstanding the fact that said record no longer constituted the "entire record in the proceeding" as provided in Section 10 (f) of the Act, further proceedings having been initiated and been pending and are now pending before the Board. The Court also modified its order of May 5, 1938, in No. 7919 in so far as the said order granted leave to the Board to withdraw the transcript of record.

7. On May 10, 1938, the Company having objected that by reason of the pendency of the proceedings in this Court the Board was without jurisdiction to proceed, the Board held its action under advisement and has not acted further under Section 10 (d) of the Act.

[fol. 104] 8. The Court's order of May 9, 1938, directing that the certified transcript of the record in No. 7919 be deemed to have been filed in the case herein as of May 4, 1938, was contrary to Section 10 (d) and (f) of the Act, and the Court had no jurisdiction to make said order. In the Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus, decided by the Supreme Court, May 31, 1938. In that case it was held that the United States Circuit Court of Appeals for the Third Circuit was without jurisdiction upon a petition for review of the Board's order against Republic Steel Corporation to prevent the Board from vacating its order pursuant to Section 10 (d) and to order the filing of a transcript of the record as it stood prior to the decision of the Board to vacate its order. A mimeographed copy of the Supreme Court's decision is herewith submitted. Clearly the decision is applicable to the case herein. The order of May 9 herein was made subsequent not merely to the Board's decision to vacate its order, but to the actual initiation of proceedings pursuant to Section 10 (d) by the Board's notice of May 6. No record had been filed in this case and the record on file in No. 7919 on May 4, the date of the Company's petition to review, was not the entire record on May 9, further proceedings in the interim having been initiated before the Board. The Court could not assume jurisdiction of this case as of May 4, or as of any date

prior to the filing of the entire record, and in this respect it is believed that the Court's order of May 9 was inadvertent, as more fully appears in the following paragraph. The Act in providing that upon the filing of a certified transcript of the entire record "the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding" (Section 10 (e) and (f), precludes the assumption of jurisdiction as of a date prior to such filing and to the service of notice thereof. [fol. 105] Moreover, in this case, proceedings were and are pending before the Board as shown in paragraphs 5, 6, and 7, supra, and the Board's final action, which may be reviewed under the Act, has not yet been had. In these circumstances, if the Court were to proceed to determine the case, in the language of the Supreme Court in the decision cited,

"a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides."

The decision of the Supreme Court is the more clearly controlling of the issue herein for the reason that the Company in this case made no request of the Board at any time for a certified copy of the transcript of the entire record, or of any record, and for the further reason that the Company filed its petition for review on May 4 only in an endeavor to prevent the Board from proceeding pursuant to Section 10 (d).

9. It is believed that the Court's order of May 9, 1938, was inadvertent in so far as it directed that the record be deemed filed "as of the time of the filing in this Court by petitioner of its petition to review and set aside the order of the Board purportedly made against it on or about December 22, 1937." At no time was it pointed out to the Court or to Judge Hicks that the order presented by the Company to Judge Hicks for signature contained any such provision. No proposed order was attached to the Company's motion papers and neither in said papers nor in the oral argument did the Company move the Court to issue an order directing the filing of the record as of a prior date. The decision of the Court as announced from the bench on May 9, 1938, provided simply that the certified transcript of record in No. 7919 "will be regarded as the certified transcript in this case." Upon information and belief a memorandum of the

decision as so announced is on file in the office of the Clerk [fol. 106] of the Court.

10. The Company will be in no wise aggrieved by the granting of the motion herein and the completion of the proceedings pending before the Board. In the Matter of the Petition of the National Labor Relations Board, supra.

Wherefore the Board, by its attorney, moves this Court for an order vacating and setting aside its order of May 9, 1938, directing that the certified transcript of the record filed in No. 7919 be deemed filed in the case herein as of the time of the filing of the Company's petition for a review of the Board's order.

Dated, Washington, D. C., this 1st day of June, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 107] *Duly sworn to by Robert B. Watts. Jurat omitted in printing.*

[fols. 108-112] Exhibit "A" to motion omitted. Printed side page 13, ante.

[fol. 113] Proposed order granting motion for leave to withdraw without prejudice omitted in printing.

[fol. 114] Exhibit "B" to motion omitted. Printed side page 25, ante.

[fol. 115] Exhibit "C" to motion omitted. See exhibit "A", printed side page 30, ante.

[fol. 116] J-205.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 21, Original

In the Matter of the Petition of the NATIONAL LABOR RELATIONS BOARD for a Writ of Prohibition and for a Writ of Mandamus.

(May 31, 1938.)

Mr. Justice ROBERTS delivered the opinion of the Court:

The motion before us involves a construction of Section 10 (d) (e) and (f) of the National Labor Relations Act,[1] providing for review of orders of the National Labor Relations Board.

May 16, 1938, the Board filed in this court a motion for leave to file a petition for writs of prohibition and mandamus directed to the judges of the United States Circuit Court of Appeals for the Third Circuit. Attached to the motion was the petition which set forth the following facts.

April 8, 1938, the Board, in a cause pending before it, issued an order directing the Republic Steel Corporation to desist from certain unfair labor practices and to take certain affirmative action. April 18 Republic filed in the Circuit Court of Appeals a petition for review alleging that the order violated the constitutional guarantee of due process because it was entered without an opportunity to Republic to support its contentions by argument or brief and thus the Board had denied it the hearing to which it was entitled. On the same day Republic requested of the Board a transcript of the entire record of its proceedings and the General Counsel of the Board replied: "I have your letter of April 18th, and received today a copy of your petition for review of the Board's order filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the court."

The rules of the Board extend to any party the right, within a reasonable period after the close of a hearing, to present oral argument before the trial examiner and, with his permission, to file briefs. They further provide that

[1] 49 Stat. 454; U. S. C., Supp. II, Tit. 29, § 160 (d) (e) (f).

the Board may decide a cause with or without allowing the parties to present oral argument before the Board itself or to submit briefs to the Board. It is the Board's practice to grant leave to submit briefs to it or to make oral argument before it whenever so requested, but the rules do not expressly state that such a request may be made or that the request, if made, will be granted. No such request was made by Republic and no brief was received or oral argument heard before the entry of the order of April 8, 1938. The rules also provide for hearing before a trial examiner of causes initiated by the filing of charges before a regional director unless the cause is transferred for hearing before the Board in Washington. If the hearing is before an examiner he is to render an intermediate report containing findings of fact and recommendations as to the disposition of the cause, which are to be served upon the parties, and they are entitled to take exceptions to the intermediate report. In cases initiated by charges filed with the Board in Washington, or transferred for hearing before the Board, it may direct the trial examiner to prepare an intermediate report but the rules do not require that such a report shall be prepared or served, or that the Board shall serve its own proposed findings of fact and conclusions of law. The complaint against Republic was initiated by charges filed with the Board. The Board did not direct the trial examiner to prepare an intermediate report and none was prepared or served, nor did the Board serve its own proposed findings [fol. 117] of fact and conclusions of law prior to the entry of its order.

Subsequent to April 25, 1938, the Board instituted the practice of notifying the parties in all proceedings before it of their right to submit briefs to the Board and, upon request, to present oral argument to the Board; and further determined that, in cases thereafter to be decided, which had been initiated before it, or transferred to it for hearing (except for special reasons in particular cases) an intermediate report should be prepared by the trial examiner and served upon the parties or, in the alternative, proposed findings of fact and conclusions should be prepared by the Board and similarly served with express notice to the parties of their right to take exceptions to the report or the proposed findings and, upon request, to be heard by the Board, orally or upon brief in support of the exceptions. In

cases already decided, in which complaint had been made of the omission of an intermediate report or proposed findings, or of the lack of written or oral argument, the Board determined to vacate its orders, to restore the causes to its docket, and to reconsider and redetermine them after granting full opportunity of exception to proposed findings and conclusions and after the service of notice of the right of the parties to submit briefs and to be heard by the Board if they should so request. Among the cases in this category was that involving Republic.

April 30, 1938, Republic moved the Circuit Court of Appeals for a stay of the Board's order and, upon the hearing of the motion, the Board advised the court that it was considering vacating the order. May 3, upon ex parte application of Republic, the court issued a rule, returnable May 13, requiring the Board to show cause why it should not file in the court a certified transcript of the record of the proceedings against Republic and made an order restraining the Board from taking any steps or proceedings whatsoever in the cause until the return day of the rule.

May 13 the Board answered the rule of May 3 stating that the record was incomplete because the Board had determined on May 3 to vacate the order and to restore the cause to the docket for further proceedings and had been prevented from so doing by the restraining order issued May 3; the answer further set out that the provisions of Section 10(d) of the National Labor Relations Act deprive the court of jurisdiction to issue the restraining order and of jurisdiction to forbid the vacation of the Board's order and to compel the filing of a transcript of the Board's record as it stood prior to the decision to vacate the order. The court made the rule absolute and enjoined the Board from taking any further steps or proceedings in the cause until the transcript was filed.

The petition of the National Labor Relations Board asserts that the court was without jurisdiction to take this action and prays a writ of mandamus directing the judges who participated to vacate the order of May 13 and a writ of prohibition against the exercise of jurisdiction upon the petition of Republic to set aside the order of April 8 without affording the Board a reasonable opportunity to vacate it.

Upon presentation of the papers we granted leave to file them and entered a rule upon the judges of the Circuit Court to show cause why the relief should not be granted as prayed, returnable May 23, and directed that, on the return day, the parties should be heard upon the question of the jurisdiction of the court to make the challenged order.

May 21, the judges filed their return admitting the allegations of the petition, except those as to the rules and practice of the Board, and its determination to vacate the orders in the Republic and other cases, which it neither admitted nor denied. The return showed that the order of May 13 was made in the view that, under Section 10(f) of the Act, Republic, by filing and serving its petition for relief, and by requesting the Board to file, or to deliver for filing, a certified transcript, complied with the jurisdictional requirements of the statute so far as was within Republic's power; that thereupon it became the duty of the Board forthwith to file a transcript and that, in the judges' opinion, jurisdiction of the court attached upon service of the petition for review and could not be defeated by the Board's [fol. 118] failure to perform its statutory duty, which was to file the transcript. The return further shows that the court was of opinion that possible damage would result to Republic from delay due to the failure to file the transcript and this consideration moved the court to a construction of the Act which called for the entry of its order. The return concludes as follows: "Recognizing the debatable character of the question presented on this record, the respondents submit themselves to the judgment of this court as to whether or not they had jurisdiction to enter the order complained of and record their readiness to vacate the same if, in the opinion of this court, jurisdiction of the cause was lacking."

As is indicated by our action on the motion of the Board for leave to file, and by the return to the rule, the question is solely of the jurisdiction of the Circuit Court of Appeals. This question is to be answered in the light of Section 10 (d) (e) and (f) of the National Labor Relations Act, the pertinent portions of which are in the margin.[2] Counsel for the

[2] "(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner

petitioner and for Republic have presented their views in oral argument and briefs.

The Board's proceedings are administrative in character. Its final action is subject to judicial review in the manner specified in the Act. Subsection (d) of Section 10, in plain terms, invests the Board with authority, at any time before the transcript shall have been filed in court, to modify or set aside its order in whole or in part. The purpose of the provision obviously is to afford an opportunity to correct errors or to consider new evidence which would render the order inadequate or unjust. The words used are "Until a transcript of the record * * * shall have been filed in a court, as hereinafter provided", the Board may vacate or modify. The following subsections, (e) and (f), are those to which we turn for the connotation of the qualifying phrase. Subsection (e) grants the Board resort to a court for the enforcement of its order. That enforcement is to be obtained by filing a petition for enforcement and filing a

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as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, * * *.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals * * * by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) * * *."

certified transcript of the Board's proceedings. The subsection proceeds: "Upon such filing, the court shall cause notice thereof to be served upon" the person against whom enforcement is asked. Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until the transcript shall have been filed and notice of the filing of the petition and the transcript has been served. Subsection (f) affords relief to "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," * * * Such a person, the statute declares, "may obtain a review" of the Board's order by filing in court "a written petition praying that the order of the Board be modified or set aside." A copy of the petition is to be served forthwith upon the Board, and "thereupon the aggrieved party shall file in the court a transcript" of the Board's proceedings. "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection [fol. 119] (e)," * * * Plainly the court may not proceed to review the Board's order under either section until a transcript is filed.

Counsel for Republic urge, in support of the Circuit Court's action, that the words, "as hereinafter provided", in subsection (d), refer to the filing of the transcript required in an enforcement proceeding initiated by the Board authorized by subsection (e) but cannot have reference to a proceeding for review initiated by any other party before the Board pursuant to subsection (f). The words of the statute do not warrant this construction. Two filings are required by subsection (f), the first of a petition, the second of a transcript. After prescribing the second, the Act provides that "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)", * * * The reference clearly is to the filing of the transcript and not to the filing of the petition. The contention that the Act cannot be applied in accordance with its apparent intent is that, as only the Board can certify the proceedings, and the petitioner under subsection (f) must file the certified transcript, such a construction would enable the Board to hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay, and perhaps deny, any effective judicial review. No such case is here presented. We have no occasion to

determine what, if any, relief may be needed by or available to a party who has filed his petition for review where the Board does not desire to modify or set aside its order, but fails or refuses to furnish a transcript of its proceedings.

Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith. Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power. It is obvious that Congress intended to confer no jurisdiction upon the reviewing court to prevent the Board from seasonably vacating or modifying its order so as to make it comport with right and justice. The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act once the transcript of the Board's proceedings is before it. It is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.

Counsel for Republic urges that the Board's petition to this court indicates that it does not intend irrevocably to abandon its former order but merely to regularize it and re-enter it after regularization and that the Act gives no power to do this after the Board has heard the case and issued an order. We have no occasion to speculate upon the future proceedings before the Board. It is enough that the petition shows that the Board desired to and would have vacated its order had it not been restrained by the action of the court. What the legal effect of its future proceedings may be we need not decide.

Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board and had the court not restrained the Board its order would have been vacated and

there now would be no order outstanding. The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court. Statutory authority to the Board to vacate its order prior to the filing of the transcript does not seem to us to differ materially from a like statutory authority to a master in chancery to modify or recall his report to a court after submission but before action by the court. No one could successfully claim to be aggrieved in a legal sense by such a statutory provision or assert that the legislature is incompetent to confer such power upon a master with consequent lack of jurisdiction in the court to forbid its exertion.

[fol. 120] The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think the writs prayed are appropriate remedies in the circumstances disclosed.[3] The Circuit Court was without jurisdiction of the subject matter. If the Board had complied with the orders made, a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides. No adequate remedy would be open to the Board by way of certiorari from the court's ultimate review of an order which the Board was authorized and desired to set aside.

The expression in the return of readiness to vacate the order entered in the Circuit Court, if this court is of opinion that the tribunal lacked jurisdiction, renders the present issue of process supererogatory. Should the order not be vacated and occasion thus arise for the award of process, the clerk may issue it upon the order of a Justice of this Court.

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[3] Compare Virginia v. Rives, 100 U. S. 313, 329; In re Rice, 155 U. S. 396, 402; In re New York & Porto Rico S. S. Co., 155 U. S. 523; In re Atlantic City Railroad, 164 U. S. 633; In re Winn, 213 U. S. 458, 466-468; Ex parte Harding, 219 U. S. 363, 377; Ex parte Oklahoma, 220 U. S. 191, 208; Ex parte Chicago, R. I. & P. Ry., 255 U. S. 273, 275.

Mr. Justice Stone and Mr. Justice Cardozo took no part in the consideration or decision of this case.

[fol. 121] J-205.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 21, Original

In the Matter of the Petition of the NATIONAL LABOR RELATIONS BOARD for a Writ of Prohibition and for a Writ of Mandamus.

(May 31, 1938)

Mr. Justice BUTLER, dissenting:

The case is not here as if on writ of certiorari or appeal for review of error alleged to have been committed by the lower court. This is an application for the writs of mandamus and prohibition to command and restrain action by the judges named. These may not be granted unless the lower court was plainly without jurisdiction to hear and determine the case or the particular issue. In re New York &c. Steamship Co., 155 U. S. 523, 531. Ex parte Oklahoma, 220 U. S. 191, 208. Ex parte Chicago, R. I. & Pac. Ry., 255 U. S. 273, 275. Precisely, the question is whether, on the facts here disclosed, the court was without power to consider and decide upon the corporation's application for an order directing the Board to certify and file a transcript of the record and restraining in the meantime any other action by it. The decision just announced answers affirmatively, and that is the basis on which the Court commands vacation of the order of the lower court and prohibits it from reviewing the order of the Board without first giving it a reasonable opportunity to vacate its order; that is, without giving the Board more time to proceed under Section 10 (d). Obviously jurisdiction of the circuit court of appeals attached upon the filing of the corporation's petition for review and service of a copy on the Board. Any other construction of Section 10 (f) would let the Board, by refusing to certify a transcript of proceedings before it, prevent judicial review of its orders. Congress did not so intend. While the statute expressly requires the person aggrieved to file a certified

transcript, it impliedly, but not less plainly, commands the Board to certify the record. This Court's decision rests on the statement that, as the term is to be applied in this instance, jurisdiction is the power to hear and determine the controversy presented in a given set of circumstances. If the lower court had jurisdiction to entertain and decide the corporation's motion, writs of mandamus and prohibition may not be granted, for they are not available for correction of mere error or even abuse of discretion. I. C. C. v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204. Ex parte Whitney, 13 Pet. 404, 408. Ex parte Taylor, 14 How. 3, 13. Ex parte Railway Co., 101 U. S. 711, 720. In re Hawkins, Petitioner, 147 U. S. 486, 490. In re Atlantic City Railroad, 164 U. S. 633, 635. In re James Pollitz, 206 U. S. 323, 331. Cf. Ex parte Simons, 247 U. S. 231, 240.

Stripped of unnecessary details and language, the circumstances under which the lower court made the challenged order may be stated briefly.

Upon charges made by the Steel Workers' Organizing Committee, the Board, July 15, 1937, issued complaint alleging that the corporation was engaging in unfair labor practices. The corporation joined issue. Before it filed answer, hearings were held by the Board, from July 21 to July 24. After answer, there were hearings before an examiner at various times and places between August 9 and September 27. April 8, 1938, the Board made its decision and order. It found the corporation guilty of practices denounced by the Act. It ordered it to cease and desist, to reinstate certain persons, to pay sufficient to equalize what [fol. 122] certain persons would have earned if employed by the corporation during specified periods, less the amount they earned at other work during those periods.

April 18, the corporation filed in the circuit court of appeals its petition to have the Board's order adjudged invalid. The petition charges that, in violation of the corporation's rights under the due process clause of the Fifth Amendment, the Board ordered the corporation to reinstate persons not alleged in the complaint to have been unlawfully discharged or discriminated against by the corporation; and so directed notwithstanding the corporation had never been accorded or offered a hearing or opportunity of making defense as to the asserted rights of those persons; that the Board made the order without affording the corporation

opportunity to present its case by argument, orally or upon brief. It alleges that, under the terms of the order, about five thousand persons may claim reinstatement, petitioner is required to reinstate or pay them as specified, the average wage is $6.50 per day. And it asserts that to defer reinstatement, pending decision by the court as to validity of the order, would involve a risk of such magnitude as imminently to threaten its right to have review in court. And the petition avers that unless the order be stayed, irreparable injury and loss will result to the corporation and that it will be denied review of a substantial part of the order. It prays service of a copy on the Board, certification by the Board of the transcript as required by law, invalidation of the order, direction to the Board to dismiss its complaint, and a stay of the order and of proceedings by the Board to enforce it, excepting such as may be taken in court.

April 18, the day on which the corporation filed petition for review, the Board, consistently with the corporation's claim as to its duty under the Act, agreed promptly to certify the transcript and to file it in court. April 22, the corporation filed an application for stay and temporary relief. Its application cited Section 10 (g), which declares that commencement of proceedings under Section 10 (f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. It stated: The purpose of the application was to prevent irreparable loss and denial of review. If, pending final determination of the case, petitioner should fail to make reinstatements in accordance with the order, its potential weekly liability would exceed $95,000. On that basis the corporation sought suspension of the portion of the order that relates to reinstatement or payment of wages, so that, if it should be upheld, the corporation's liability to reinstate or to pay would commence ten days after the final decree of the court. In a brief submitted in support of its motion, the corporation maintained that the order is invalid because the corporation was not afforded a fair and full hearing and because the order is one for re-employment and not for reinstatement; and that unless the stay be granted, the corporation will suffer irreparable financial losses.

April 30 the corporation's motion came on for hearing. The Board appeared and argued against it. The court neither granted nor denied the application. The rule to

show cause, issued May 3, recites that at the hearing, April 30, the Board stated that it "was seriously considering withdrawing, modifying or changing its order in the case and reopening same." The Board's application for vacation of that order states that at the hearing on April 30 the Board advised the court that it was contemplating vacating its order, and would advise the court of its final position not later than May 4, 1938; that, on May 3, it notified the corporation that it had definitely decided to vacate the order; but that, before any steps to do so could be taken, the court had issued the restraining order. The Board maintained that as the transcript had not been filed, Section 10 (d) was applicable and that the Board then had the right to withdraw or vacate the order.

In its answer to the rule to show cause, the Board says that it was not guilty of refusal to certify or of dilatory [fol. 123] tactics, and that on April 18 its counsel informed the corporation's counsel that the Board would as promptly as possible prepare the record for certification. "This task of considerable magnitude was forthwith commenced and was incomplete a week later when the supervening decision of the Supreme Court in Morgan v. United States (decided April 25, 1938) was rendered. * * * There is no question in this case, therefore, whether the court had jurisdiction to require the Board to file a record when such filing has been long delayed or refused by the Board. The Board has with all promptness elected to exercise its power to vacate its order under Section 10 (d), and there is no merit in petitioner's claim that that section is inapplicable because the Board has evaded its obligations under the Act."

In these circumstances the court did not lack jurisdiction to hear and determine the controversy presented by the corporation's application for an order directing the Board to certify the record for filing in court. The Act contemplates prompt action. Section 10 (i) declares that petitions filed under it shall be heard expeditiously "and if possible within ten days after they have been docketed." Power under Section 10 (d) to change or vacate its order does not enable the Board to delay filing the record. At the bar counsel expressed the opinion that the Board may vacate an order without notice, Section 10 (d). It had fifteen days, April 18 to May 3, to decide whether to vacate the order or join

issue. That period included a week before and a week after our decision in Morgan v. United States, supra. The Board does not claim that it needed until May 3 to certify the transcript. So the issue before the lower court was the very narrow one, whether for an unreasonable length of time the Board withheld the record. And that question involves consideration of subsidiary ones: To what extent, if at all, a certification may be delayed by the choice of the Board to enable it to consider modification or repeal of its order. Whether after decision in Morgan v. United States more than a reasonable time had elapsed. While there is room for difference of opinion on these questions, it is very hard to perceive on what ground it may be held that the court was without jurisdiction to decide them or even to conclude that the order was an arbitrary exertion of power, or that restraint against further delay by the Board involved an abuse of discretion.

I am of opinion that the lower court had jurisdiction of the case and of the issues decided by the challenged order, and that therefore the Board's application for writs of mandamus and prohibition should be denied.

Mr. Justice McReynolds concurs in this opinion.

[fol. 124] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO REMAND—Filed June 2, 1938

To Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company

Please Take Notice that on the 6th day of June, 1938, at 9 A. M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion to remand will be presented to

the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated June 1, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

Receipt of above notice acknowledged this 1st day of June 1938.

(Signed) Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 125] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO REMAND—Filed June 2, 1938

Comes now the National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and shows as follows:

1. In the event that the Court denies the Board's motion, herewith filed, to vacate the Court's order of May 9, 1938, the case herein should be remanded to the Board for the completion of the proceedings properly initiated prior to the Court's order of May 9, and now pending before the Board, as shown in paragraphs 2 through 7 of the Board's said motion, to which the Court respectfully is referred. The certified transcript of the record on file in the Court is incomplete and does not show "the final action, review of which the statute provides" (In the Matter of the Petition of the National Labor Relations Board, decided by the Supreme Court, May 31, 1938), and is not the entire record upon which the Court may determine the case pursuant to Section 10 of the Act. The proper manner in which to remedy this situation, if the Board's motion to vacate the order of May 9 is denied, would be to remand the case to the Board for the completion of its proceedings and of the record thereof.

2. In addition to the completion of the proceedings pending before the Board and of the record thereof, the granting

of the motion herein would result in obviating upon the record certain questions sought to be raised by the Company concerning the validity of the Board's order, as more fully [fol. 126] appears in Exhibit A annexed to the Board's said motion to vacate. Should the instant motion be granted, the Board now advises the Court that it will forthwith set aside its findings and order of December 22, 1937, issue proposed findings to which the parties will be permitted to file exceptions, and if they so desire argue objections before the Board, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as may be deemed advisable. The Company may not now be heard to protest that the Board proposes to accord in full the very procedure of which the Company claims to have been deprived. Neither will the Company be heard to impute to the Board an intention to act perfunctorily. See In the Matter of the Petition of the National Labor Relations Board, supra. Cf. Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699, 701; Lehmann v. State Board of Public Accountancy, 263 U. S. 394, 398; Continental Baking Co. v. Woodring, 286 U. S. 352, 369. The official acts of public officers are supported by a presumption of regularity (United States v. Chemical Foundation, Inc., 272 U. S. 1, 14-15; United States v. Berry, 67 F (2d) 763, 764 (C. C. A. 6), cert. den. 292 U. S. 648) and the Court will assume that the granting of the motion herein would result in reconsideration of the case by the Board.

3. The granting of the motion herein would in no way prejudice the Company, which indeed seeks to have the Board's order set aside. In the Matter of the Petition of the National Labor Relations Board, supra. The Company's suggestion on oral argument of its motion on May 9, 1938, that the alleged errors of the Board under Morgan v. United States, decided April 25, 1938, now sought to be corrected by the Board, are so inextricably interwoven with other errors of the Board that no valid order can ever be entered upon this record, is palpably without merit and in any event the Court will not pass on any such question until the further proceedings are completed. In the Matter of the Petition of the National Labor Relations Board, supra. The Com- [fol. 127] pany's own confidence in the validity of its suggestion is negatived by its resistance to the Board's pro-

posals for further proceedings. Since the Board is proposing to accord the Company what it complains to have been deprived of, the Company should be estopped to assert that it will be prejudiced by the granting of this motion and clearly it will not be prejudiced.

Wherefore the Board, by its attorney, in the event that the Court denies the Board's motion filed herewith to vacate the Court's order of May 9, 1938, moves this Honorable Court to issue an order remanding the case to the Board for further proceedings.

Dated, Washington, D. C., this 1st day of June 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 128] *Duly sworn to by Robert B. Watts. Jurat omitted in printing.*

[fol. 129] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION—Filed June 6, 1938

Please Take Notice that the annexed motion for leave to amend the petition of Ford Motor Company, filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board, and the proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building in the City of Covington, Kentucky, on the 8th day of June, 1938, at 9 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as it may be presented.

Dated, June 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

Receipt of the above notice together with a copy of the annexed motion on the 4th day of June, 1938, is hereby [fol. 130] acknowledged.

Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 131] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR A REVIEW OF AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed June 6, 1938

Now Comes Ford Motor Company, petitioner in the above-entitled cause, by its attorneys, and moves this Court for leave to amend its petition filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board by inserting a new paragraph numbered 48-a between paragraphs 48 and 49 of said petition, as follows:

48-a. Said order and each and every part thereof is invalid and void because neither the Board nor the members thereof were impartial triers of the facts in making the decision upon the complaint against petitioner, in that at the time the Board considered and determined the complaint against petitioner the Board and the members thereof possessed a fixed bias and entertained a fixed prejudice against employers in general and possessed a fixed bias and entertained a fixed prejudice in favor of unions and [fol. 132] union activities, unlawful as well as lawful, and further in that said Board and the members thereof possessed a fixed bias and entertained a fixed prejudice against petitioner, and further in that it was the settled practice of the Board and the members thereof to regard the issuance of a complaint against an employer as proof of the commission of unfair practices, and so regarded the complaint against petitioner.

and by striking out paragraph 38 of said petition and inserting in lieu thereof a new paragraph 38, as follows:

"38. Petitioner was without knowledge of the matters alleged in paragraphs 7, 21 to 34, inclusive, 35, 35-a, 35-b, 35-c, 36, 37, 39, 40, 46, 47, 48, 48-a and 68 hereof until after January 8, 1938, when, by virtue of the Board having on January 7, 1938, filed in this Court its petition to enforce said order and a certified transcript of the record in the proceedings before the Board and by virtue of the Court having caused notice of such filing to be served upon petitioner on January 8, 1938, the Board had lost all jurisdiction of the proceedings in which said purported order was purported to be made and this Court had acquired complete, plenary and exclusive jurisdiction of the proceeding and the questions determined therein.

and by adding to said petition a new paragraph 68 as follows:

68. By reason of the manner in which the Board considered and determined the case before it, petitioner was deprived of a full, fair and open hearing in violation of the National Labor Relations Act and of the due process [fol. 133] clause in the Fifth Amendment to the Constitution of the United States.

Dated June 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

[fol. 134] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Before Hicks, Simons and Allen, Circuit Judges

ORDER GRANTING MOTION TO REMAND, ETC.—Filed June 10, 1938

In this cause It Is Ordered that—

(1) The objections of respondent filed May 21, 1938, to the interrogatories propounded by petitioner and filed May 12, 1938, be and are sustained and the interrogatories are stricken from the record.

(2) The petition filed by petitioner on May 19, 1938, for a commission to take depositions of witnesses is denied.

(3) The motion of petitioner filed June 4, 1938, for a judgment pro confesso or in the alternative to compel respondent to answer the petition or to treat the petition as denied by respondent, is overruled and denied.

(4) The motion filed by petitioner on May 19, 1938, to amend its petition for review is denied.

(5) The motion of petitioner filed June 6, 1938, for leave to amend its petition for review is denied.

(6) The motion of respondent filed June 2, 1938, to vacate the order of May 9, 1938, directing that the transcript filed in cause No. 7919 should be treated as filed in this cause is denied.

(7) The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of De-
[fol. 136] cember 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted. But this order to remand is stayed for thirty days from this date pending application to the Supreme Court for a writ of certiorari; Provided

That, if within such period the applicant shall file with the clerk of this court a certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

(8) The application of petitioner to be heard in oral argument upon the motions and matters herein determined is denied.

Approved for entry.

Xen Hicks, Circuit Judge.

[fol. 137] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 18, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, petitioner hereby indicates the following portions of the record to be incorporated into a transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari and requests that such transcript and the transcript of record designated by the praecipe filed simultaneously herewith in case No. 7919 be consolidated physically and certified together and that such consolidated transcript be delivered to the undersigned, counsel for petitioner.

1. Petition for a review of and to set aside an order of the National Labor Relations Board, filed May 4, 1938.

2. Motion of petitioner to compel the National Labor Relations Board to furnish certified transcript of record and [fol. 138] for temporary injunction and affidavit of Frederick H. Wood in support thereof, filed May 5, 1938.

3. Order, dated May 9, 1938, with regard to certified transcript of record of proceedings before the National Labor Relations Board.

4. Motion of petitioner for leave to amend petition for a review of and to set aside order, filed May 19, 1938.

5. Motion of petitioner for leave to amend petition for a review of and to set aside order, filed June 6, 1938.

6. Motion of respondent to vacate order of May 9, 1938, filed June 2, 1938.

7. Motion of respondent to remand cause, filed June 2, 1938.

8. Order, dated June 10, 1938.

9. This praecipe of petitioner for transcript of record.

Dated, June 17, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

Receipt of a copy of the above praecipe superseding a similar praecipe of even date hereby acknowledged this 17th day of June, 1938.

Robert B. Watts, Acting General Counsel, N. L. R. B.

[fol. 139] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, respondent hereby indicates the ollowing additional portions of the record to be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari.

1. Motion of petitioner to consolidate causes, filed May 4, 1938.

2. Opposition of respondent to motion to consolidate causes and to motion to compel certification of transcript of record and for a temporary injunction, filed May 9, 1938.

3. Opposition of respondent to motion for leave to amend petition for review, filed on or about May 23, 1938.

4. This praecipe of petitioner for additional portions for transcript of record.

Dated: June 22, 1938.

Robert B. Watts, Acting General Counsel National Labor Relations Board.

Receipt of a copy of the above praecipe hereby acknowledged this 22d day of June, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 182

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted and the case is assigned for argument on Monday, November 7, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 142] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 183

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument on Monday, November 7, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.